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VEIL OF IGNORANCE: TUNNEL CONSTRUCTIVISM IN FREE SPEECH THEORY

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ABSTRACT—Modern free speech theory is dominated in the courts and the academy alike by a constructivist style of reasoning: it posits a few axiomatic purposes of speech and from these deduces detailed rules of law. This way of thinking can make the law blind to the actual consequences of legal rules and damage both individual liberty and democracy. I develop this claim through a critique of the work of Martin Redish, who has developed the most sustained and sophisticated constructivist theory of free speech. Free speech constructivism is not the only way to understand the First Amendment. It is a fairly recent development, emerging only in the 1970s. The idea of free speech, on the other hand, dates back to Milton's arguments in the 1640s. This Article identifies the pathologies of constructivism and recovers an older, more attractive free speech tradition.

AUTHOR—John Paul Stevens Professor of Law and Professor of Political Science, Northwestern University. This Article owes its inspiration to several years of teaching with Vincent Blasi's fabulous casebook, *Ideas of the First Amendment* (2d ed. 2012). Special thanks to Peter DiCola for putting up with my incessant questions about copyright law and scholarship, and to Steve Heyman for unusually detailed and challenging comments. Helpful comments also came from Bruce Ackerman, Matthew Adler, Larry Alexander, Ron Allen, Jack Balkin, Vincent Blasi, Harry Clor, Richard Fallon, Samuel Freeman, Heather Gerken, Sally Gordon, John McGinnis, Tracy Meares, Chris Nofal, John Durham Peters, Jim Pfander, Jed Rubenfeld, Fred Schauer, Scott Shapiro, Jonathan Shaub, Steve Shiffrin, Rogers Smith, Steven D. Smith, Larry Solum, Mark Tushnet, Laura Weinrib, students in the seminar on Theories of Free Speech that I cotaught with Professor Redish in Spring 2010, the Yale Legal Theory Workshop and its student colloquium, and the University of Pennsylvania Law School and University of Illinois College of Law faculty workshops. I am also grateful for conversations with the late C. Edwin Baker. And thanks, as always, to Marcia Lehr for indispensable research assistance.

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INTRODUCTION

Modern free speech theory is dominated, in the courts and the academy alike, by a style of reasoning that posits a few axiomatic purposes of speech: "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . ."[1] "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"[2] "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-

[1] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

[2] Wooley v. Maynard, 430 U.S. 705, 714 (1977) (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

government and a necessary means to protect it."[3] From these axioms one deduces detailed rules of law and deems irrelevant any consequences that were not taken account of in that deduction. This way of thinking, which I will call "tunnel constructivism," can damage both individual liberty and democracy.

Tunnel constructivism is a subset of a broader kind of political theory, called "constructivism" by John Rawls, that tries to derive concrete prescriptions for action from a parsimonious set of premises. Tunnel constructivism differs from generic constructivism in that the tunnel constructivist deliberately ignores the consequences of those prescriptions, including consequences that most people would deem relevant as a matter of common sense. The metaphor of tunnel constructivism is intended to capture both of these characteristics. In a tunnel, there is only one direction you can go, and the tunnel prevents you from seeing anything outside. Tunnel vision is to be expected in a tunnel. Tunnel constructivism is not confined to free speech—libertarian views about property and contract are other examples—but the theory is salient and increasingly influential in the free speech context.

The conjunction of these two properties, deduction and consequence insensitivity, define tunnel constructivism. Deduction is necessary but not sufficient. The theorist must also be disposed to give deduction's consequences overriding weight. A principle can have a deductive provenance without having absolute strength.[4]

Constructivism in some sense is unavoidable. For example, the deduction of a political prescription from a narrow set of premises is characteristic of all law. More generally, the procedure of inferring a plan of action from a few premises, and of following standardized behavioral protocols, is an inevitable and valuable part of normal human conduct. We could not get through a single hour without routines. But none of this requires blindness to consequences at the architectonic level, in the creation of the routines themselves. It is this blindness that distinguishes tunnel constructivism.[5] Blindness to consequences usually reflects nothing more than the limits of human intelligence. In the specific pathology I am describing, the blindness is an effect of the constructivism: one clings to a plan of action in the teeth of manifestly destructive results because one is in the grip of a philosophical construct that tells him that these results don't matter. In the free speech area, the aim of tunnel constructivism is not

[3] Citizens United v. FEC, 130 S. Ct. 876, 898 (2010).

[4] I owe this formulation to Frederick Schauer.

[5] Of course, this blindness does not matter if the consequences being neglected are in fact negligible, or if the commonsense tendency to care about them is itself pathological, for example by being a manifestation of prejudice. (That is the appeal of the ideal of color-blindness in law, for example.) What makes tunnel constructivism pathological is that it ignores consequences that manifestly matter.

merely to prevent judges from considering consequences. All law does that. The aim is to insulate an entire civilization from cognizing certain consequences of legal rules.

If my real grievance is consequence insensitivity, why make deduction part of the definition?[6] I do so because tunnel constructivism is a distinctive syndrome. Compare a case where a medicine causes diabetes in some patients. The grievance is diabetes, but etiology matters: diabetes has many causes, most of them unrelated to this drug. The pattern of causation between this drug and the diabetes is a distinctive problem. If you want to prevent diabetes, you should disaggregate its causes and study them one at a time. Similarly, consequence insensitivity has many causes. Here I examine one of them, a particular abuse of constructivism.

Tunnel constructivism is not the only way to understand the First Amendment. The effort to deduce free speech rules from a parsimonious set of principles is a fairly recent development, emerging only in the 1970s. The idea of free speech, on the other hand, dates back to Milton in the 1640s. This Article will identify the pathologies of tunnel constructivism and recover an older and more attractive free speech tradition.

That tradition is not deductive at all. It is frankly result oriented. Its goal is a vibrant sphere of public discourse, where antagonistic views compete for public acceptance and dissenting ideas proliferate. It rests on mutually reinforcing ideals of individual character and collective identity. Rules are tools, created to protect the functioning of this sphere. Judges are given discretion to devise such rules for the mundane reason that they are more likely than legislatures to protect speech in an appropriate way. The test of any rule is precisely its consequences: does it help to produce thriving public discussion and culture in a society of free, self-governing people?

I. THE PATHOLOGIES OF TUNNEL CONSTRUCTIVISM

I begin with three examples of the pathologies of tunnel constructivism.

Campaign finance reform legislation typically restricts both campaign contributions and independent expenditures on elections. These restrictions raise First Amendment issues because they restrain political communication, but it is argued that they are necessary because they prevent political corruption. Sometimes, when private interests spend large amounts of money to help elect officeholders, their reward is that they get to decide what the officeholders do with their offices. In the limit case, large donors write legislation, confident that legislators who owe them favors will rubber-stamp what they produce.

[6] Thanks to Vince Blasi for pressing me on this question. Both he and Richard Fallon demanded a clearer general definition of the kind of constructivism that I am criticizing.

Opponents of such restrictions have offered two responses. One is an empirical challenge: they claim that large donations and independent expenditures do not, in fact, purchase political influence. (I express no opinion here about whether they are right.) If the empirical predicate of the restrictive legislation is false, then it cannot constitute a compelling interest. Everything turns on the correct description of the world.

However, the Supreme Court, when it recently invalidated the McCain–Feingold campaign finance law in *Citizens United v. FEC*, offered a different response. It declared that even if these claims of purchased political power are accurate, *it doesn't matter*. When campaign speech by private donors is restricted, "the electorate [is] deprived of information, knowledge and opinion vital to its function."[7] Any restriction on campaign speech "uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves."[8] Even if large amounts are spent to influence elections, and even if the large spender succeeds in swaying the result and so purchases the winner's gratitude (or fear), this willingness to spend "presupposes that the people have the ultimate influence over elected officials."[9] The donor may have frequent access to the official, and the official may respond to each of the donor's concerns with an abject eagerness to please, but this is not corruption unless there is a one-for-one trade of financial support for legislative favors. "The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt . . . ."[10] The way in which the Court conceives the world entails that the alleged corruption is invisible and irrelevant.[11]

Another pathology of tunnel constructivism is its response to tobacco advertising. The tobacco industry depends on recruiting teenagers: 60% of smokers begin by the age of fourteen,[12] and 90% begin smoking before twenty.[13] Nicotine is perhaps the most addictive drug in existence, far more so than heroin or cocaine.[14] Most smokers want to quit and are unable to do

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[7] *Citizens United*, 130 S. Ct. at 907 (quoting United States v. CIO, 335 U.S. 106, 144 (1948) (Rutledge, J., concurring in the result)).

[8] *Id.* at 908.

[9] *Id.* at 910.

[10] *Id.*

[11] The opinion might also be read as an example of the Court merely applying preexisting free speech rules in good stare decisis fashion, having silently considered and rejected the arguments for departing from or reshaping these rules. There is, however, no evidence in the opinion itself to support this charitable reading. Thanks to Heather Gerken for pressing me on this point.

[12] *See* Vincent Blasi & Henry Paul Monaghan, *The First Amendment and Cigarette Advertising*, 256 JAMA 502, 503 (1986).

[13] MARK A.R. KLEIMAN, AGAINST EXCESS: DRUG POLICY FOR RESULTS 443 n.27 (1992).

[14] Kleiman reports:

> Some evidence about what might be thought of as *capture ratios* for various drugs—the proportion of their users who go on to compulsive use—comes from the surveys conducted by the Gordon S. Black Corporation. Respondents were asked both whether they had ever tried a given

so.[15] There is substantial evidence that advertising helps induce teenagers to begin smoking.[16] For this reason, tobacco advertising has been severely restricted.[17]

In *Lorillard Tobacco Co. v. Reilly*,[18] however, the Court invalidated a statute barring billboard advertising of tobacco products within 1000 feet of a school or playground. The Court did not dispute the state's evidence that tobacco advertising recruits children to the use of an addictive and deadly drug.[19] Even if these claims were true, *it didn't matter*. "We must consider that tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products."[20] The burden on speech, the Court held, was too "onerous"[21] to survive scrutiny.

With both campaign finance and tobacco advertising, the Court thought that unrestricted speech simply means that the public is getting more information. Perhaps, in both cases, the public is being manipulated and harmed. The Court held, in both cases, that awareness of the manipulation and the harm are impermissible from the standpoint of free speech theory, which must assume, in the teeth of massive evidence to the

> drug and whether they had ever "felt 'hooked' on" that drug. Nicotine was the outlier: 59 percent of those who had ever smoked a cigarette reported that they had been dependent at one time or another. The only other form of drug taking with a capture ratio greater than 1 in 5 was smoking cocaine (22 percent). The ratios for the other three powerful mass-market drugs were remarkably close together: 17.1 percent for alcohol, 16.6 percent for powder cocaine, and 13.7 percent for marijuana . . . .

Id. at 41–42.

[15] Duff Wilson & Julie Creswell, *Where There's No Smoke, Altria Hopes There's Fire*, N.Y. TIMES, Jan. 31, 2010, at BU1 ("Cigarette profits are growing thanks to price increases and a customer base of people who haven't kicked the habit. About 70 percent of the nation's 46 million smokers say they want to quit, government surveys show, and about 40 percent try every year. But only 2.5 percent succeed, the surveys say. The government estimates that 400,000 Americans die of smoking-related diseases each year.").

[16] *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 558 (2001) ("[C]hildren smoke fewer brands of cigarettes than adults, and those choices directly track the most heavily advertised brands, unlike adult choices, which are more dispersed and related to pricing. Another study revealed that 72% of 6 year olds and 52% of children ages 3 to 6 recognized 'Joe Camel,' the cartoon anthropomorphic symbol of R. J. Reynolds' Camel brand cigarettes. After the introduction of Joe Camel, Camel cigarettes' share of the youth market rose from 4% to 13%." (citations omitted)).

[17] Most recently, the Family Smoking Prevention and Tobacco Control Act, Pub. L. 111-31, 123 Stat. 1776 (2009), gave the Food and Drug Administration broad authority over tobacco, including the power to regulate tobacco marketing. The constitutionality of this provision has not yet been tested.

[18] 533 U.S. 525.

[19] *Id.* at 556–61.

[20] *Id.* at 564.

[21] *Id.*

contrary, that citizens are competent and capable of processing information.[22]

More generally, free speech theory seems to prohibit government restrictions on speech that are based on the desire to have certain kinds of speech flourish more than others. This attention to consequences is treated as a kind of covert viewpoint discrimination, and viewpoint discrimination is always impermissible.

This requirement of blindness to consequences makes it hard even to cognize one of the most pressing contemporary free speech issues, the impact of copyright law on speech. Any modification of existing copyright law—in fact, any copyright law at all—requires precisely a tradeoff between different forms of speech, which must inevitably be animated by a choice about which of these forms is judged most desirable.[23]

Consider the most parsimonious possible rule of copyright, one that bars the simple copying of copyrighted works.[24] Copyright is a source of income for authors, so it creates an incentive for them to produce speech. But it does so by stifling other speech. When the law suppresses pirated editions, it keeps the work out of the hands of some people who would otherwise consume it.[25] We are trading some speech for other speech.

The same is true of any other rule of copyright law. Whatever level of protection is given to authors creates an additional degree of incentive to produce, while simultaneously choking off speech that would otherwise be produced. You can't have one without the other. If such judgments are impermissible, then it is impossible even to begin to think about copyright law's effect on free speech.

Neil Netanel observes that "copyright has come increasingly to resemble and be thought of as a full-fledged property right rather than a limited federal grant designed to further a particular public purpose."[26] When copyright law was first enacted in 1790, the maximum term was 28 years;[27] now it can exceed 100 years.[28] Authors were originally free to build

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[22] On the pervasiveness of this assumption, see Lyrissa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799. Lidsky capably shows that audiences must be assumed to possess this kind of rationality for some free speech purposes. It does not follow that such rationality must be stipulated in all cases. *See also* Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579 (2004); Frederick Schauer, *Free Speech and the Assumption of Rationality*, 36 VAND. L. REV. 199 (1983) (book review).

[23] *See* Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1 (2000).

[24] This was the law at the time of the original Constitution. *See* NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX 59 (2008).

[25] *See* Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After* Eldred, 44 Liquormart, *and* Bartnicki, 40 HOUS. L. REV. 697, 726 (2003).

[26] NETANEL, *supra* note 24, at 6.

[27] *Id.* at 57.

upon, reference, comment upon, or parody previous works. Today, authors can be sued if they merely appropriate themes or storylines from earlier works, and composers may be liable if their work creates an "impression of similarity" with previous work.[29] Speech-protective limitations on copyright, such as the rule that original expression is protected but ideas are not, the privilege of *de minimis* copying, and the privilege of "fair use," have all been weakened.[30] The consequence has been a massive chilling of speech, which has redounded to the benefit of a few large media conglomerates, such as Time Warner and the Walt Disney Company, that own enormous inventories of well-known copyrighted works.

The Court's only serious engagement with this problem was *Eldred v. Ashcroft*,[31] which upheld Congress's decision to extend existing copyright terms for an additional twenty years, keeping a huge number of works out of the public domain for 120 years after their creation. The Copyright Term Extension Act was, in large part, a response to lobbying by large corporate copyright holders.[32] The Act created a heavy burden on speech. Authors' ability to build on earlier work—and nearly all creators do this—was massively restricted. There was no corresponding benefit for speech because Congress in 1998 could not create additional incentives for authors in 1923.

Yet the Court upheld the Act with remarkable insouciance, showing little appreciation for what was at stake.[33] "The First Amendment securely protects the freedom to make—or decline to make—one's own speech; it bears less heavily when speakers assert the right to make other people's speeches."[34] Eugene Volokh, drawing on a series of canonical First Amendment cases, has shown how inconsistent this is with the rest of free speech law:

> Speakers often express themselves using words or symbols that communicate their own feelings or ideas more effectively than what they themselves could have created. Johnson, for instance, didn't invent flag burning, and the Tinkers didn't invent black armbands. Cohen may have taken the "Fuck the Draft" line from someone else, or perhaps may have even bought a ready-made jacket with that text. Union members regularly hand out leaflets written by others. Whenever someone waves a flag, distributes Bibles, or sings a song (whether a protest song or a love song) that others wrote, he is expressing himself using

[28] *Id.* at 57–58.

[29] *Id.* at 58–59.

[30] *Id.* at 62–66.

[31] 537 U.S. 186 (2003).

[32] *See* Ben Depoorter, *The Several Lives of Mickey Mouse: The Expanding Boundaries of Intellectual Property Law*, VA. J.L. & TECH., Spring 2004, at 1, 3 n.2, http://www.vjolt.net/vol9/issue2/v9i2_a04-Depoorter.pdf.

[33] The opinion's weaknesses are anatomized in NETANEL, *supra* note 24, at 172–85.

[34] *Eldred*, 537 U.S. at 221.

> "other people's speech[]," at least in the sense of speech written (and sometimes even owned) by other people.[35]

The Court in *Eldred* relied on a model of speech that fails to correspond to the way that speech actually is generated in the world. Once more, that reality has somehow been filtered out of the picture.

In campaign finance, in tobacco advertising, and in copyright, the Court's way of thinking about free speech demands that certain destructive consequences of speech rules simply do not count: they must be invisible to us.

Of course, any law of free speech will be, to some extent, deductive and consequence insensitive. Legal claims must be honored whenever their elements have been proven by the party who invokes them.[36] This narrowing of the legal horizon is especially important in free speech law, which aims to protect unpopular, dissenting viewpoints. In the three cases just discussed, however, deduction and consequence insensitivity prevail even at the architectonic level, in the design of the rules themselves.

The approach to free speech that now dominates the Court's thinking is not the only way to think about free speech. Rather, it is the product of a recent intellectual style that only loosely connects to the foundational commitments at the base of free speech tradition. A turn back to those foundations reveals that free speech theory can be far more flexible and capable of accommodating reality than the Court's current approach implies.

The Court's approach is the consequence of "free speech tunnel constructivism": the effort to work out determinate rules of free speech from a few simple premises and to filter out all information not involved in that deductive enterprise. It takes multiple forms because different constructivisms have different starting points, but it is united by its style of reasoning.

Free speech tunnel constructivism in its pure form is only to be found in the academy. The Supreme Court has never adopted a single constructivist theory of speech. But constructivism's deductive style, particularly its tendency to filter salient harms of speech out of consideration even at the highest level of decisionmaking, has become a part of Supreme Court jurisprudence. Some of free speech constructivists' most urgent concerns, such as the protection of campaign contributions and commercial speech, are now the law.

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[35] Volokh, *supra* note 25, at 726–27 (alteration in original) (footnotes omitted).

[36] Clifford Geertz observes that "the defining feature of legal process" is "the skeletonization of fact so as to narrow moral issues to the point where determinate rules can be employed to decide them." CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 170 (3d ed. 2000).

There have been two waves of tunnel constructivism in free speech theory. The first wave attempted a positive account of free speech, working out detailed doctrinal prescriptions. More recently, skeptical writers, criticizing the work of the first wave but sharing its assumption that any free speech theory must be tunnel constructivist, have concluded that no coherent defense of free speech is possible.

This Article proposes a different approach. Free speech, I will argue, is a historical artifact aimed at a contingent set of purposes that emerged from the Protestant Reformation, the scientific revolution, emergent patterns of democratic governance, and the Romantic ideal of authenticity. It aims at the realization and preservation of distinctive, interlocking ideals of individual character and public discourse—ideals that first emerged in the 1600s and that persist today. If free speech is a universal human right, it is because all members of every culture have an urgent interest in living in a regime whose public and private institutions realize some form of those ideals.

Part II of this Article introduces constructivism by describing the work of John Rawls, the most prominent modern constructivist political theorist (and the coiner of the term), and James Madison, principal author of the First Amendment and, I shall argue, the most successful constructivist theorist of free speech. It concludes by noting the limitations of Madison's approach with illustrations from incitement and defamation law. Part III examines modern free speech tunnel constructivism, primarily by a critique of its most distinguished and persistent exponent, Martin Redish. I also engage the new negative tunnel constructivists, Larry Alexander and Stanley Fish. Part IV describes the earlier tradition, focusing on John Milton and John Stuart Mill, and more briefly considering free speech's leading defenders in the early twentieth century, such as Oliver Wendell Holmes, Louis Brandeis, Alexander Meiklejohn, and Thomas Emerson, the most influential theorist just before the new wave of tunnel constructivist theories. Part V offers a synthesis of this tradition, describing the institutions and traits of personal character upon which the system of free expression depends. Rules are to be judged by how well they keep these institutions and traits in good working order. Part VI returns to the problems with which the Article began by showing that a more substantive approach to free speech law can do better than tunnel constructivism at producing sensible answers to the problems of campaign finance, commercial speech, and copyright law. A brief Conclusion follows.

II. CONSTRUCTIVISM

A. Rawlsian Constructivism

Constructivism in free speech theory is often presented as the only possible way to think about free speech, but it is a recent development. It began in the early 1970s. During this time, John Rawls created a revolution

in political philosophy. Before Rawls, Anglo-American philosophers scrupulously eschewed any substantive claims about morality or politics because "[t]hey were determined not to compromise the rational purposes of conceptual clarification with expressions of purely personal feeling."[37] It was thought that normative political philosophy was dead: utilitarian, Marxist, and natural rights ideas had all been shown to be equally indefensible.[38]

Rawls brought about a methodological revolution. "The instant achievement of *A Theory of Justice* was to show that questions of great ethical urgency, such as the proper balance between liberty and equality, could be discussed without the slightest loss of rational rigor or philosophical rectitude."[39] Rawls is the most sophisticated modern proponent of social contract theory—a tradition going back to Hobbes, Locke, and Rousseau. He proposed that society should be seen as a scheme of cooperation among equals. In order for the social contract to be fair, its terms should be those that would be devised in a hypothetical "original position," without any of the parties knowing their position in society, most relevantly whether they would be rich or poor.[40] Even those who disagreed with details of Rawls's theory—libertarian Robert Nozick[41] most prominent among them—were nonetheless impressed by this possibility. The early 1980s saw an explosion of new work in normative political theory.[42]

It probably is not coincidental that in the decade following the publication of Rawls's book, free speech theories in the Rawlsian style, attempting to deduce a detailed doctrinal structure from a narrow set of premises, proliferated.[43] Different theorists relied on different premises. Robert Bork, Lillian BeVier, and John Hart Ely invoked democracy.[44] David Richards invoked individual dignity.[45] T.M. Scanlon invoked Millean self-direction.[46] C. Edwin Baker invoked self-expression.[47]

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[37] Judith N. Shklar, *Injustice, Injury, and Inequality: An Introduction*, *in* JUSTICE AND EQUALITY HERE AND NOW 13, 13 (Frank S. Lucash ed., 1986).

[38] *See* IAN SHAPIRO, POLITICAL CRITICISM 3–4 (1990).

[39] Shklar, *supra* note 37.

[40] JOHN RAWLS, A THEORY OF JUSTICE 11–12 (1971) [hereinafter RAWLS (1971)]; JOHN RAWLS, A THEORY OF JUSTICE 10–11 (rev. ed. 1999) [hereinafter RAWLS (1999)].

[41] *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

[42] *See* SHAPIRO, *supra* note 38, at 3–8.

[43] For a discussion of the similarity between these theories and that of Rawls, see STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 110–39 (1990).

[44] Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975).

[45] David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974).

[46] Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972).

Benjamin DuVal invoked the need to correct erroneous beliefs.[48] Martin Redish invoked self-realization.[49]

It is impossible to prove that Rawls's work caused this proliferation, just as it is impossible to prove that, as Leonard Krieger alleges in his history of eighteenth-century Europe, Pietist Protestantism and the German Enlightenment's growing emphasis on emotions is reflected in the growing fluidity and passion of the later music of Haydn and Mozart.[50] But the similarity of argumentative style is striking. More importantly, although these writers' arguments shared many of the strengths of Rawls's approach, they also acquired, and indeed accentuated, his vulnerabilities.[51]

Political constructivism, as Rawls understands it, begins with a conception of free and rational persons that is implicit in modern democratic culture. It holds that "the principles of political justice (content) may be represented as the outcome of a certain procedure of construction (structure)."[52] Constructivism in ethics holds that ethical principles are constructed by human agents for human purposes, that these principles can establish practical prescriptions, and that those recommendations can be justified.[53] The constructivism Rawls offers "holds that moral objectivity is to be understood in terms of a suitably constructed social point of view that

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[47] C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978).

[48] Benjamin S. DuVal, Jr., *Free Communication of Ideas and the Quest for Truth: Toward a Teleological Approach to First Amendment Adjudication*, 41 GEO. WASH. L. REV. 161 (1972).

[49] Martin H. Redish, *Campaign Spending Laws and the First Amendment*, 46 N.Y.U. L. REV. 900 (1971); Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971). I also note Thomas Jackson and John Jeffries, who thought free speech rested on two values: democracy and individual self-fulfillment. Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979).

[50] LEONARD KRIEGER, KINGS AND PHILOSOPHERS, 1689–1789, at 151, 218 (1970).

[51] Although the 1970s saw a great deal of scholarship in the constructivist style, there are important exceptions. For example, Laurence H. Tribe worked very much in the mode of Thomas Emerson. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 576–736 (1st ed. 1978); *see also infra* text accompanying notes 326–42. Tribe sets forth some general speech values, TRIBE, *supra*, at 576–79, and then he proceeds to devise doctrines consistent with, but not deduced from, these values. Vincent Blasi emphasizes the function of speech in checking the abuse of official power, but states: "I do not purport to offer a comprehensive ordering of First Amendment values or to suggest that the checking value should form the cornerstone of all First Amendment analysis." Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 528.

[52] JOHN RAWLS, POLITICAL LIBERALISM 89–90 (expanded ed. 2005).

[53] *See* Onora O'Neill, *Constructivism in Rawls and Kant*, *in* THE CAMBRIDGE COMPANION TO RAWLS 347, 348 (Samuel Freeman ed., 2003). O'Neill also notes that the term "constructivism" is commonly used to refer to antirealist views, holding that there are no distinctively moral facts or properties. *Id.* at 347–48. This aspect of constructivism is irrelevant here.

all can accept. Apart from the procedure of constructing the principles of justice, there are no moral facts."[54]

The term "constructivism" does not appear in *A Theory of Justice*; Rawls uses it in a retrospective description of his work.[55] The description is nonetheless apt. The parsimonious conception of persons and their needs in the original position, and the decision procedure modeled in *A Theory of Justice*, generates the principles of justice. Rawls aims to show that acceptance of those principles "is the only choice consistent with the full description of the original position. The argument aims eventually to be strictly deductive."[56]

Rawls is not, however, a tunnel constructivist. His deductions take place within a larger account of justification that he calls "reflective equilibrium," in which we try to bring our considered moral judgments into line with our more general principles. "A conception of justice cannot be deduced from self-evident premises or conditions on principles; instead, its justification is a matter of the mutual support of many considerations, of everything fitting together into one coherent view."[57] Any general theory must be consistent with the specific judgments "in which we have the greatest confidence," such as our judgments "that religious intolerance and racial discrimination are unjust."[58] These are "provisional fixed points which we presume any conception of justice must fit."[59] The deduction, in short, does not always go in one direction for Rawls. "It is a mistake to think of abstract conceptions and general principles as always overriding our more particular judgments."[60]

Freedom of thought and speech, Rawls thought, were among the basic liberties that his theory entailed.[61] The protection of sedition, for example, was a necessary condition of democracy.[62] But his endorsement of free speech was qualified by his more fundamental commitments. He was prepared to limit speech for the sake of political liberty, which "must be approximately equal, or at least sufficiently equal, in the sense that everyone has a fair opportunity to hold public office and to influence the outcome of political decisions."[63] For these reasons, he criticized the

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[54] JOHN RAWLS, *Kantian Constructivism in Moral Theory* (1980), *in* COLLECTED PAPERS 303, 307 (Samuel Freeman ed., 1999).

[55] *See* O'Neill, *supra* note 53, at 350–51.

[56] RAWLS (1971), *supra* note 40, at 121; RAWLS (1991), *supra* note 40, at 104.

[57] RAWLS (1971), *supra* note 40, at 21; RAWLS (1991), *supra* note 40, at 19.

[58] RAWLS (1971), *supra* note 40, at 19; RAWLS (1991), *supra* note 40, at 17.

[59] RAWLS (1971), *supra* note 40, at 20; RAWLS (1991), *supra* note 40, at 18.

[60] RAWLS, *supra* note 52, at 45. For a good discussion of the role of reflective equilibrium in Rawls's work, see SAMUEL FREEMAN, RAWLS 29–42 (2007).

[61] The basis for this conclusion was underspecified in *A Theory of Justice*, but Rawls clarified it in his later work. *See* FREEMAN, *supra* note 60, at 53–59.

[62] RAWLS, *supra* note 52, at 342.

[63] *Id.* at 327.

Supreme Court's unwillingness to let Congress freely regulate campaign finance and supported public financing of campaigns, limits on private political advertising paid for by interested industries, and access to public broadcasting.[64]

Samuel Freeman has observed that the "overriding concern" of all of Rawls's work "is to describe how, if at all, a well-ordered society in which all agree on a public conception of justice is realistically possible."[65] To Rawls, a well-ordered society "is a society all of whose members accept, and know that the others accept, the same principles (the same conception) of justice."[66] Rawls's theory aims to establish a stable basis for mutually respectful political life in a society that is profoundly divided about the good life. Political liberalism is first and foremost a response to a problem: "[H]ow is it possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical, and moral doctrines?"[67]

Rawls's answer is that citizens can agree upon the basic structure that parties in the hypothetical "original position" would agree to. In the original position, a "veil of ignorance" prevents any of the parties from knowing such morally irrelevant facts as their position in society and conception of the good.[68] The argument depends, of course, on a prior determination that what is put behind the veil is in fact morally irrelevant.[69]

Rawls argues that people with different comprehensive conceptions of the good—and disagreement about such comprehensive conceptions is a chronic condition of modern society—can and should reach an "overlapping consensus" on the principles of political cooperation.[70] In an overlapping consensus, they may disagree about the ultimate foundations of the political principles that govern them, but they agree upon the principles and that those principles are moral and affirmed on moral grounds.[71] Rawls's aspiration depends upon there being enough people with reasonable comprehensive views to make an overlapping consensus possible.

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[64] *Id.* at 356–63.

[65] SAMUEL FREEMAN, JUSTICE AND THE SOCIAL CONTRACT: ESSAYS ON RAWLSIAN POLITICAL PHILOSOPHY 4 (2007).

[66] JOHN RAWLS, *A Kantian Conception of Equality* (1975), *in* COLLECTED PAPERS, *supra* note 54, at 254, 255.

[67] RAWLS, *supra* note 52, at 4.

[68] *See* RAWLS (1971), *supra* note 40, *passim*; RAWLS (1999), *supra* note 40, *passim*.

[69] The argument works better with one's position in society than it does with one's conception of the good. My idea of the good is not obviously morally arbitrary in the way that my inherited privileges are. I value ends not because they happen to be mine, but because I think they are worthy, worthy for anyone. *See* ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY 129–39 (1993); GEORGE SHER, BEYOND NEUTRALITY: PERFECTIONISM AND POLITICS 79–83 (1997).

[70] RAWLS, *supra* note 52, *passim*.

[71] *Id.* at 144–50.

Rawls's constructivism intentionally abstracts away from the objects of disagreement. Political liberalism, he argues, should be freestanding so that it "can be presented without saying, or knowing, or hazarding a conjecture about, what [comprehensive] doctrines it may belong to, or be supported by."[72] "[T]he political conception of justice is worked out first as a freestanding view that can be justified *pro tanto* without looking to, or trying to fit, or even knowing what are, the existing comprehensive doctrines."[73] Whether it abstracts too much is an open question. The exactness of the physical sciences, Albert Jonsen and Stephen Toulmin observe, "is purchased only at a price. They are 'exact and idealized' because they are highly *selective*: they pay direct attention only to circumstances and cases that are 'abstracted' (i.e., selected out) as being relevant to their central theoretical goals."[74] Rawls similarly abstracts away from the plurality of comprehensive conceptions of the good.

Rawls understands that each person must fit the constructivist theory back into her own comprehensive conception for it to be persuasive to her. He never abandons the method of reflective equilibrium. The political conception Rawls offers "is a module, an essential constituent part, that fits into and can be supported by various reasonable comprehensive doctrines that endure in the society regulated by it."[75] To accept constructivism in its strongest form, you must accept the starting point and every inference that is drawn from that starting point, and you must be prepared to override all values that conflict with those inferences. Constructivism is always an iceberg floating on an ocean of comprehensive views, solidified because of the circumstances that make this kind of theory necessary, but fundamentally made of the same stuff in which it is afloat. Constructivism may be deductive and consequence insensitive, but the comprehensive conceptions on which it depends need not be, and probably cannot be. Rawls, once more, is not a tunnel constructivist, though the very abstract description of the parties in the original position may give that impression.

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[72] *Id.* at 12–13.

[73] John Rawls, *Reply to Habermas*, 92 J. PHIL. 132, 145 (1995). For similar formulations, see JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 37, 188–89 (Erin Kelly ed., 2001); RAWLS, *supra* note 52, at xlvii; and JOHN RAWLS, *The Idea of Public Reason Revisited* (1997), *in* COLLECTED PAPERS, *supra* note 54, at 573, 585. T.M. Scanlon explains why the strategy of surveying actual comprehensive views would not be satisfactory to Rawls: "It would be impossible to survey all possible comprehensive views and inadequate, in an argument for stability, to consider just those that are represented in a given society at a given time since others may emerge at any time and gain adherents." T.M. Scanlon, *Rawls on Justification*, *in* THE CAMBRIDGE COMPANION TO RAWLS, *supra* note 53, at 139, 164. On the other hand, as this Article shows, a consensus built around the convergence of a contingent set of actual views may last a long time.

[74] ALBERT R. JONSEN & STEPHEN TOULMIN, THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING 31 (1988).

[75] RAWLS, *supra* note 52, at 12.

Because many starting points are available, many constructivisms are possible. "[N]ot everything can be constructed and every construction has a basis, certain materials, as it were, from which it begins."[76]

An example of a tunnel constructivism that produces results antithetical to Rawls's own ideal of political equality is minimal-state libertarianism, which would forbid any redistribution of resources and permit the state only to enforce rules of property and contract. Libertarians begin with a conception of each person as a holder of whatever property he may find himself in possession of in the actual world and then deem whatever private contracts these persons enter into to be just. Libertarianism is blind to the consequences of its construction of rights: There may be vast political inequalities. Some people may even be forced to accept slavery.[77] But since the process by which this result was reached was a just one, these inequalities do not matter.

This vision of a just society is not liberalism, but rather resembles its ancient adversary feudalism, in which parties trade their allegiance for protection by the powerful.[78] The fundamental error of libertarianism is that it takes existing property rights for granted and fetishizes them, instead of recognizing property as an institution constructed by human beings for human ends, the details of which can and should be specified with those ends in mind.[79]

Tunnel constructivism is, strictly speaking, not refutable. It generates a closed system of results that follow from its premises, and its proponents can insist on those results regardless of the consequences. However, there must be a threshold decision whether to be constructivist, and this will depend on the cost as assessed in terms of one's comprehensive view. That cost may be too high.[80]

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[76] JOHN RAWLS, *Themes in Kant's Moral Philosophy*, *in* COLLECTED PAPERS, *supra* note 54, at 497, 514.

[77] *See* SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 74–88 (1989).

[78] *See* Samuel Freeman, *Illiberal Libertarians: Why Libertarianism Is Not a Liberal View*, 30 PHIL. & PUB. AFF. 105 (2002).

[79] On the specific flaws of Nozick's libertarian critique of Rawls, see THOMAS W. POGGE, REALIZING RAWLS 15–62 (1989). For further exploration of the weaknesses of libertarianism, see ANDREW KOPPELMAN, THE TOUGH LUCK CONSTITUTION AND THE ASSAULT ON HEALTH CARE REFORM (2013), and ANDREW KOPPELMAN WITH TOBIAS BARRINGTON WOLFF, A RIGHT TO DISCRIMINATE? HOW THE CASE OF *BOY SCOUTS OF AMERICA V. JAMES DALE* WARPED THE LAW OF FREE ASSOCIATION (2009).

[80] *See* Andrew Koppelman, *The Fluidity of Neutrality*, 66 REV. POL. 633 (2004) [hereinafter Koppelman, *The Fluidity of Neutrality*]; Andrew Koppelman, *The Limits of Constructivism: Can Rawls Condemn Female Genital Mutilation?*, 71 REV. POL. 459 (2009). Rawls increasingly appreciated the costs of constructivism in his later work, in which he narrows the range of claims he thinks can be justified, makes more limited claims about the justifications that can be shared, and makes clear that he is writing only to an audience of people who already live in liberal democracies and value democracy's institutions. *See* O'Neill, *supra* note 53, at 349–53.

The cases with which we began show that as with Rawlsian constructivism, the Court uses a veil of ignorance to filter out facts it regards as not properly relevant to decisions about which speech the law may suppress. Here, too, the threshold decision to be tunnel constructivist demands justification.

B. Madisonian Constructivism

James Madison's 1799 *Report on the Virginia Resolutions* is the paradigm of free speech constructivism, in part because the author was the principal drafter of the First Amendment and in part because it is one of the most powerful constructivist arguments that has ever been devised. The Sedition Act of 1798 made it a crime to write about Congress or the President "with intent to defame" or "to excite against them . . . the hatred of the good people of the United States."[81] Madison wrote a resolution, subsequently enacted by the Virginia legislature, declaring that the Sedition Act was unconstitutional. The Act, the resolution declared, "ought to produce universal alarm, because it is levelled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right."[82] He supported the resolution with a report elaborating on its claims. Madison's best argument was the following:

> 1. The Constitution supposes that the President, the Congress, and each of its Houses, may not discharge their trusts, either from defect of judgment or other causes. Hence they are all made responsible to their constituents, at the returning periods of elections; and the President, who is singly intrusted with very great powers, is, as a further guard, subjected to an intermediate impeachment.
> 2. Should it happen, as the Constitution supposes it may happen, that either of these branches of the government may not have duly discharged its trust, it is natural and proper, that, according to the cause and degree of their faults, they should be brought into contempt or disrepute, and incur the hatred of the people.
> 3. Whether it has, in any case, happened that the proceedings of either or all of those branches evince such a violation of duty as to justify a contempt, a disrepute, or hatred among the people, can only be determined by a free examination thereof, and a free communication among the people thereon.[83]

If public officials are to be held accountable by elections, then the electors must be able to discuss the merits of the officials.

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[81] Ch. 74, § 2, 1 Stat. 596, 596–97 (1798).

[82] James Madison, *The Virginia Report*, *in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 231, 243 (Marvin Meyers ed., rev. ed. 1981).

[83] *Id.* at 263–64.

The argument is elegant and sound in part because it relies not at all on the First Amendment's ambiguous text.[84] Rather, it infers a right of free speech from the structural commitment to elections. Madison considers citizens only in their capacity as voters, ignoring everything else about them. If citizens are voters, then it follows that they may vote out the incumbents. If they are to do that, then they must be able to communicate with one another about whether the incumbents should be voted out of office. But the Sedition Act bars them from doing that. Ergo, the Sedition Act is inconsistent with the democratic structure.

C. The Limits of Madisonian Constructivism

Even here, though, Madison is not a tunnel constructivist. He finds it necessary implicitly to deny the view—held by, among others, Alexander Hamilton[85]—that prohibitions of sedition are necessary for democracy because seditious speech tends to drive good and capable people away from public office, thus hamstringing democracy in a different way.[86] And he certainly rejects the view famously laid down in *Tuchin's Case*, that "it is very necessary for every Government, that the people should have a good opinion of it."[87] He does not even mention, much less confront, these empirical issues.

Nor does Madison attempt anything like a complete theory of free speech. His argument is narrowly confined to the targeted suppression of seditious speech. He does not address the protection of any other kind of speech[88] or even the burdening of seditious speech through means other

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[84] Madison does not admit his lack of reliance on the text here, but Charles L. Black, Jr. notes it when he develops a similar argument in CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 39–45 (1969).

[85] *See* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 34 (2004). John Marshall probably held the same view. *See* Kurt T. Lash & Alicia Harrison, *Minority Report: John Marshall and the Defense of the Alien and Sedition Acts*, 68 OHIO ST. L.J. 435 (2007).

[86] For similar contemporaneous views, see DONNA LEE DICKERSON, THE COURSE OF TOLERANCE: FREEDOM OF THE PRESS IN NINETEENTH-CENTURY AMERICA xv, 5–6 (1990). The argument has never gone away. Similar concerns were stated by then-Judge (later President and Chief Justice) William Howard Taft, *see* DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 160 (1997), and by Justice Byron White, *see* Gertz v. Robert Welch, Inc., 418 U.S. 323, 400 (1974) (White, J., dissenting). This concern is one reason why no other jurisdiction has adopted an approach toward defamation of public officials as protective of speech as America. *See* ERIC BARENDT, FREEDOM OF SPEECH 198–226 (2d ed. 2005); GATLEY ON LIBEL AND SLANDER §§ 15.21–.27, at 547–62 (Patrick Milmo & W.V.H. Rogers eds., 11th ed. 2008).

[87] Tuchin's Case, (1704) 90 Eng. Rep. 1133 (K.B.) 1134, *quoted in* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 9 (1985).

[88] Other scholars have tried to work out the implications of Madison's argument. Robert Bork famously argued on the basis of Madison's premises that only political speech was protected. *See* Bork, *supra* note 44. Alexander Meiklejohn, another neo-Madisonian, resisted this conclusion but had difficulty explaining why. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 256–57. For an attempt to push the Madisonian premises to their outer limit, see Andrew

than sedition laws, such as the prohibition of incitement to crime or the ordinary common law tort of defamation.

Madison's view did not prevail in the courts until the twentieth century, but many others made arguments like his, albeit less rigorously, at the time he wrote and for many years afterward. It quickly became conventional wisdom that the Sedition Act had been improper and that public discussion of political matters was constitutionally protected.[89]

The power of the idea of free speech rested less on logic than on settled practice: Leonard Levy notes the "nearly epidemic degree of [unpunished] seditious libel that infected American newspapers after Independence."[90] In popular culture, the claim for free speech lost its logical, constructivist edge and became merely a set of slogans—slogans that were nonetheless politically powerful and contributed to a vibrant culture of free discussion, at least outside the slaveholding South.[91]

Madison became a touchstone for thinking about the incitement question, beginning with Judge Learned Hand's justly celebrated opinion in *Masses Publishing Co. v. Patten*.[92] Judge Hand tried to use Madisonian premises to cabin the speech-repressive implications of the World War I espionage law. The statute, Judge Hand argued, could not reasonably be construed to "contradict the normal assumption of democratic government that the suppression of hostile criticism does not turn upon the justice of its substance or the decency and propriety of its temper."[93] Judge Hand's argument, however, was not merely deductive. He relied on many premises not derivable from the fact of democracy itself, such as the premise that juries are likely to unfairly attribute an illegal purpose to a speaker who articulates an unpopular view.[94]

The same point applies to other speech-protective incitement tests, from the dissenting opinions of Justices Holmes and Brandeis to the Supreme Court's exceedingly speech-protective test in *Brandenburg v. Ohio*.[95] All rest on evaluative and predictive judgments that it is better to tolerate than to repress speech that advocates violating the law, so long as

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Koppelman, *Madisonian Pornography or, The Importance of Jeffrey Sherman*, 84 CHI.-KENT L. REV. 597 (2009).

[89] *See* MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 52–116, 205–15 (2000).

[90] LEVY, *supra* note 87, at x.

[91] *See generally* CURTIS, *supra* note 89.

[92] 244 F. 535 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917).

[93] *Id.* at 540.

[94] *See* VINCENT BLASI, IDEAS OF THE FIRST AMENDMENT 475–540 (1st ed. 2006).

[95] 395 U.S. 444 (1969) (per curiam).

the connection between the speech and the crime is at least somewhat attenuated.[96]

New York Times v. Sullivan[97] relies on Madisonian constructivism,[98] but it, too, is not resolvable by Madisonian logic alone. The suit against the *Times* did not involve a sedition law. Yet, a government official was obviously using tort law to suppress unwelcome criticism. Clearly, strict liability for defamation could deter criticism of public officials in a way functionally equivalent to sedition law.[99] The Court, however, had no way to know how much valuable speech was deterred by defamation law or how harmful this was to the political process.[100] The Court's argument untidily pulls together a number of different considerations to support its result: the analogy with seditious libel, the danger of chilling valuable speech, the public's duty to engage in political debate, and the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[101]

The opinion also relies on a Stoical character ideal, constituting the public realm as a necessarily hurtful place where officials must forfeit protections against defamation that ordinary citizens enjoy.[102] The Court reaches for the best alternative to common law libel available at the time: a minority rule in some state courts that comments on public affairs are presumptively privileged.[103] There is no deduction.[104] The opinion's unifying theme is that it is "informed by an overall vision of a free society."[105]

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[96] *See* RICHARD H. FALLON, JR., THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW 41 (2004); Frederick Schauer, *Is It Better to Be Safe than Sorry?: Free Speech and the Precautionary Principle*, 36 PEPP. L. REV. 301 (2009).

[97] 376 U.S. 254 (1964).

[98] *See id.* at 274–75.

[99] *See* HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 60–73 (Jamie Kalven ed., 1988).

[100] *See* Harry H. Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1113, 1115 (1979). Subsequent research has gone some way toward clarifying these questions, though much remains to be done. *See, e.g.*, THE COST OF LIBEL: ECONOMIC AND POLICY IMPLICATIONS (Everette E. Dennis & Eli M. Noam eds., 1989).

[101] *N.Y. Times Co.*, 376 U.S. at 270.

[102] *See* JOHN DURHAM PETERS, COURTING THE ABYSS: FREE SPEECH AND THE LIBERAL TRADITION 167 (2005).

[103] *See* KALVEN, *supra* note 99, at 61.

[104] Fallon notes that Ronald Dworkin's attempt to justify the decision on constructivist grounds ignores the crucial role of instrumental calculations about the amount of self-censorship, good and bad, that the press would engage in under different liability regimes. RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 28–31 (2001). Although one of Fallon's leading articles is *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987), he is not a tunnel constructivist.

[105] Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1637 (1987).

Free speech necessarily involves abstraction, a blinkering of particulars. In free speech law,

> Nazis become political speakers, profit maximizing purveyors of sexually explicit material become proponents of an alternative vision of social existence, glorifiers of sexual violence against women become advocates of a point of view, quiet residential streets become public forums, and negligently false harmful statements about private matters become part of a robust debate about issues of public importance.[106]

These rules, however, remain *created*, with an essentially legislative discretion, and "anything short of permanent and conclusive entrenchment must permit the judge in every case to perceive all of those factors that might in the rare case lead to modification of the entrenched category."[107] Free speech law imposes veils of ignorance on the lower courts that administer it.[108] Courts must ignore facts that ordinary people would think highly relevant. But the architects of law do not themselves belong behind that veil. Rather, they should construct the rules in full awareness of their probable consequences.

III. MODERN FREE SPEECH CONSTRUCTIVISM

Modern free speech constructivists, as noted earlier, do not all follow Madison in the core value from which they deduce their speech-protective rules. Some, like Madison, start with democracy, but then trace this commitment to conclusions more elaborate than anything Madison attempted.[109] Some start with the goal of individual self-realization.[110] Some aim at the attainment of truth.[111] Some start with Kantian autonomy.[112]

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[106] Frederick Schauer, *Harry Kalven and the Perils of Particularism*, 56 U. CHI. L. REV. 397, 397 (1989) (book review).

[107] *Id.* at 411.

[108] Here I refer not only to courts below the Supreme Court, but to any court that is obligated to follow relevant precedent. A district court deciding a free speech issue of first impression is not a "lower court" in this sense.

[109] In addition to the sources cited *supra* note 44, see ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT (1995); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993); and James Weinstein, *Democracy, Sex and the First Amendment*, 31 N.Y.U. REV. L. & SOC. CHANGE 865 (2007). Although he thinks that speech fundamentally promotes self-realization, Redish also belongs in the democratic-theory camp because he thinks self-realization entails democracy, and vice versa. *See* Martin H. Redish & Abby Marie Mollen, *Understanding Post's and Meiklejohn's Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression*, 103 NW. U. L. REV. 1303 (2009) (elaborating an original account of how democracy entails free speech).

[110] In addition to the sources cited *supra* notes 46–47, 49, see C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989); MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS (1984) [hereinafter REDISH, FREEDOM OF EXPRESSION]; and DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION 165–227 (1986).

[111] In addition to DuVal, *supra* note 48, the classic citation for this theory is JOHN STUART MILL, ON LIBERTY (Gertrude Himmelfarb ed., Penguin Classics 1987) (1859), although Mill is more

Different constructivisms can, of course, yield different results. For example, Martin Redish and C. Edwin Baker both aim at self-realization, but their different procedures of construction yield opposing results with respect to commercial speech.[113] And constructivism need not be tunnel constructivism: some constructivists are willing to abandon the consequences of their theories if the consequences are too severe.[114]

As I said at the outset, deductive theory is a necessary but not a sufficient condition of tunnel constructivism. The theorists just described varied considerably in their inclination to ignore consequences other than the master values they relied on. For example, T.M. Scanlon began as a tunnel constructivist. In a 1972 article, he argued that respect for citizens' autonomy entails that speech cannot be prohibited simply because it results in listeners having false beliefs or in listeners coming to believe that they ought to perform harmful actions.[115] He later recanted precisely because the principle was too cost insensitive. A free speech principle should restrict the costs that justify restricting speech, but that principle "must itself be based on a full consideration of all the relevant costs."[116]

A. Redish

A definitive critique of tunnel constructivism is probably impossible. It would have to survey and respond to every constructivist theory ever devised, and even then could not address future tunnel constructivisms that

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complicated than this. The Supreme Court has often cited the simple truth-advancement story. *See* BAKER, *supra* note 110, at 3–24. It is unclear whether the story about emerging truth is doing the work or the metaphor of a market that is loaded with unstated assumptions. For the latter view, see ROBERT L. TSAI, ELOQUENCE AND REASON: CREATING A FIRST AMENDMENT CULTURE 60–68 (2008), and John Durham Peters, *The "Marketplace of Ideas": A History of the Concept*, *in* TOWARD A POLITICAL ECONOMY OF CULTURE: CAPITALISM AND COMMUNICATION IN THE TWENTY-FIRST CENTURY 65 (Andrew Calabrese & Colin Sparks eds., 2004).

[112] In addition to Richards, *supra* note 45, see CHARLES FRIED, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT 78–142 (2004); RICHARDS, *supra* note 110, at 165–227; David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991); and Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159 (1997). Although Wellington, *supra* note 100, makes a less deductive argument and neglects to draw out the doctrinal implications, he also begins with Kantian autonomy.

[113] *Compare* REDISH, FREEDOM OF EXPRESSION, *supra* note 110, at 60–68, MARTIN H. REDISH, MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY 14–62 (2001) [hereinafter REDISH, MONEY TALKS], *and* Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67 (2007) [hereinafter Redish, *Commercial Speech*] (concluding that commercial speech is entitled to First Amendment protection), *with* BAKER, *supra* note 110, at 194–224 (concluding that commercial speech deserves no such protection).

[114] *See* Strauss, *supra* note 112.

[115] Scanlon, *supra* note 46.

[116] T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 533 (1979).

might answer its criticisms. All that one can do is take a particularly salient example and offer reasons to think that the objections it elicits have analogues among its tunnel constructivist rivals.

I will therefore focus here on the work of Redish, who is the most important and influential tunnel constructivist. His very large corpus of books and articles on free speech may together constitute the most thoroughly worked out theory of this kind that anyone has ever devised.[117] The Supreme Court has cited his First Amendment scholarship five times,[118] and C. Edwin Baker observes that when the Court decided to give heightened protection to commercial speech, it "offered arguments that duplicated those that Redish had advanced several years before."[119] The same duplication is unmistakable in *Citizens United*.[120] Increasingly, we are living in Redish's free speech world.

Redish disavows "attempts to resolve complex and difficult issues by means of rigid, hard-line distinctions and categorizations."[121] Rather, the aim should be "general guidelines of interpretation that simultaneously provide the strong deference to free speech interests that the language and the policies of the first amendment command while allowing the judiciary the case-by-case flexibility necessary to reconcile those interests with truly compelling and conflicting societal concerns."[122] As we shall see, however, with respect to the free speech issues considered at the outset of this Article, Redish is rigid indeed.

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[117] Most of the leading constructivists of the 1970s wrote one article and then moved on to other subjects. *See supra* notes 44–48 (citing Richards, Bork, BeVier, Ely, Scanlon, and DuVal). Of the writers in the constructivist mode, the only author who worked out a position as sustained as Redish's is C. Edwin Baker. *See* BAKER, *supra* note 110; C. EDWIN BAKER, MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS (2007); C. EDWIN BAKER, MEDIA, MARKETS, AND DEMOCRACY (2002). Baker, however, is not really a free speech theorist because he gives no special weight to speech as compared to other exercises of liberty. I follow Frederick Schauer in holding that a free speech principle must at least be "a principle according to which speech is *less* subject to regulation . . . than other forms of conduct having the same or equivalent effects." FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 7 (1982).

For the same reason, I also exclude Ronald Dworkin, who gives no special protection to speech as such in his general theory of liberal equality, and whose speech-protective arguments are therefore fragile. *See* RONALD DWORKIN, *Do We Have a Right to Pornography?*, *in* A MATTER OF PRINCIPLE 335 (1985); RONALD DWORKIN, *Pornography and Hate* and *MacKinnon's Words*, *in* FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 214, 227 (1996). For a critique of Dworkin's work, see RAE LANGTON, *Whose Right? Ronald Dworkin, Women, and Pornographers*, *in* SEXUAL SOLIPSISM: PHILOSOPHICAL ESSAYS ON PORNOGRAPHY AND OBJECTIFICATION 117 (2009); SCHAUER, *supra*, at 61–65.

It is also relevant that neither Baker's nor Dworkin's theories correspond to the Supreme Court's present free speech doctrine nearly so well as Redish's.

[118] Westlaw search of "Redish" in the Supreme Court database, Dec. 13, 2012.

[119] C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 IND. L.J. 981, 982 (2009).

[120] Citizens United v. FEC, 130 S. Ct. 876 (2010).

[121] REDISH, FREEDOM OF EXPRESSION, *supra* note 110, at 3.

[122] *Id.*

1. The Argument for the Self-Realization Value.—Redish's theory is complex, but its basic elements are simple. All speech that is relevant to individual or collective decisionmaking is entitled to exactly the same level of protection. Laws that restrict speech are subject to strict scrutiny. They can be justified only by interests that are truly vital. Some purported interests, however—notably the reasons typically given for restricting campaign spending and commercial speech—are not even permissible, much less compelling, because they are viewpoint discriminatory.

Redish's foundational claim is that all values that have been cited to support free speech are reducible to a single one: individual self-realization. All speech that fosters this value should therefore receive the same protection. This first principle "can be proven, not merely by reference to some unsupportable, conclusory assertions of moral value, but by reasoning from what we in this nation take as given: our democratic system of government."[123] He argues that "the moral norms inherent in the choice of our specific form of democracy logically imply the broader value, self-realization."[124] The intrinsic value of democracy, the one "achieved by the very existence of a democratic system," is "the value of having individuals control their own destinies."[125] The instrumental value of democracy is "development of the individual's human faculties."[126] It follows that "any speech that may aid in the making of private self-governance decisions is deserving of first amendment protection."[127]

To support this claim, Redish offers the following hypothetical[128]: Imagine a society in which every decision affecting individuals—dinner menus, hairstyles, bedtimes—is made by a collective vote. Under the logic of democracy, debate and information about all these decisions would have to receive full constitutional protection. Then suppose that all of these decisions are ceded to individuals, as our own society does. What sense would it make to say that information relevant to those decisions is no longer a constitutional right? How can the individual have a right to information about decisions he controls indirectly as a voter, yet have that right disappear if he is given total authority over the same decisions?

If these arguments are accepted, then the approach the Court has followed since *Chaplinsky v. New Hampshire*,[129] "which recognizes a sublevel of speech that is unworthy of constitutional protection, would have to be abandoned."[130] As we shall see, Redish goes some way toward

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[123] *Id.* at 12 (footnote omitted).
[124] *Id.*
[125] *Id.* at 20.
[126] *Id.* at 21.
[127] *Id.* at 80.
[128] *Id.* at 24–26.
[129] 315 U.S. 568 (1942).
[130] REDISH, FREEDOM OF EXPRESSION, *supra* note 110, at 55.

rebuilding the doctrinal structure he attacks on the basis of compelling interests, rather than the differential value of speech. Through this reasoning, threats, libel of private figures, criminal conspiracies, and criminal solicitation would still be denied protection. Because he rules out many interests as impermissible, however, the consequence is a radical reformulation of the law.

For the argument to persuade, the reader must accept Redish's articulation of the sole purported moral basis of democracy.[131] The undefended assumption that a longstanding social institution such as democracy must have a single moral basis is surprising.[132] Institutions evolve. They are not created by designers. Even if someone created the institution of free speech, there is no reason to assume that she did it for a single purpose. On the contrary, it is likely that any longstanding practice serves more purposes than any single human mind can comprehend.[133]

Many different people support democracy for many different reasons. Redish confronts this difficulty by summarily stating and dismissing a few rival justifications. For example, he dismisses the consequentialist justification that democracy produces better results than other systems: "How are we to decide what is 'better'? . . . And better for whom?"[134] But with this move, Redish is no longer discussing the reasons why someone might support democracy. He is now looking for only those reasons that can persuade any rational person—and his hypothetical rational person is paralyzingly skeptical of consequentialist reasoning. An institution may, however, be stable over long periods of time without having *any* justification that can persuade all rational persons. (Try justifying the rules of baseball to Redish's hypothetical skeptic.) Democracy could be supported for many generations by a society of consequentialists who never agree among themselves about which of its consequences make democracy good.

Frederick Schauer's alternative view is that freedom of speech has no essential core, but is instead a cluster of interrelated principles.[135] Redish at

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[131] *Contra* Farber & Frickey, *supra* note 105, at 1640–41.

[132] It is, however, an assumption with which Redish begins in the first sentence of his best known article on free speech: "Commentators and jurists have long searched for an explanation of *the* true value served by the first amendment's protection of free speech." Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 591 (1982) (emphasis added), *reprinted in* REDISH, FREEDOM OF EXPRESSION, *supra* note 110, at 9.

[133] Ronald Allen's criticisms of high constitutional theory emphasize this idea. *See* Ronald J. Allen, *Constitutional Adjudication, the Demands of Knowledge, and Epistemological Modesty*, 88 NW. U. L. REV. 436 (1993); Ronald J. Allen & Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge*, 72 ST. JOHN'S L. REV. 1149 (1998).

[134] REDISH, FREEDOM OF EXPRESSION, *supra* note 110, at 20.

[135] *See* SCHAUER, *supra* note 117, at 14; Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 277 (1981); Frederick Schauer, *Codifying the First Amendment:* New York v. Ferber, 1982 SUP. CT. REV. 285, 313 [hereinafter Schauer, *Codifying the First Amendment*]; Frederick Schauer, *Must Speech Be Special?*, 78 NW. U. L. REV. 1284, 1302 (1983).

one point concedes the possibility that free expression might be deemed to foster "a complex intersection of multiple values," but he counters that the application of those values to specific cases "would presumably be no more or less syllogistic than the shaping of doctrine through the application of an assumed single underlying value."[136] If, however, no formula is available for weighing these values against one another, then the promised syllogisms will never appear. The complex set of incommensurable values that together constitute health is one of many reasons why medicine cannot be reduced to syllogisms.[137]

Redish has described his method as following this procedure: "[A]sk why we choose a democratic system in the first place and, by this process of reverse engineering, glean more foundational normative values underlying the commitment to both democracy and free expression."[138] The danger of such reverse engineering, conspicuously instantiated by the "scientific creationists," is that more than one sequence of causes can produce a given result. You can't deduce from any result what process must have produced it.

He also has a different argument, based on the intrinsic value of democracy: "[I]t is doubtful that many of us would be anxious to discard democracy even if it were established definitely that an alternative political system was more efficient."[139] So Redish's audience is only those who think democracy is intrinsically valuable, not those who support democracy only because of its good results. But even some who value democracy intrinsically do so not because of democracy's positive contribution to self-realization, but for its negative effect of preventing citizens from tyrannizing over one another. Consider Jean-Jacques Rousseau, the most influential proponent of the intrinsic value of democracy. Rousseau, with no inconsistency, was an energetic proponent of censoring the arts and religious opinions.[140] Rousseau loved democracy but hated individual self-

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Schauer's *Free Speech: A Philosophical Enquiry*, *supra* note 117, published in 1982, reacted to the constructivisms of the 1970s, surveying the various premises that had been offered and trying to work out what can really be deduced from each of them.

[136] Redish, *Commercial Speech*, *supra* note 113, at 104.

[137] *See infra* text accompanying notes 233–43.

[138] Redish & Mollen, *supra* note 109, at 1337 n.159.

[139] REDISH, FREEDOM OF EXPRESSION, *supra* note 110, at 20.

[140] *See* JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT (Roger D. Masters ed., Judith R. Masters trans., 1978) [hereinafter ROUSSEAU, ON THE SOCIAL CONTRACT]; JEAN-JACQUES ROUSSEAU, POLITICS AND THE ARTS: LETTER TO M. D'ALEMBERT ON THE THEATRE (Allan Bloom trans., 1960). This aspect of Rousseau's thought is made especially clear in JUDITH N. SHKLAR, MEN & CITIZENS: A STUDY OF ROUSSEAU'S SOCIAL THEORY (1969); see also JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY 96–98, 107 (Thomas Burger & Frederick Lawrence trans., 1989). Rousseau approved of censorship because, to put the point in the terms of Robert Post, discussed *infra* in the text accompanying notes 168–81, he thought that democracy needed extremely strong civility norms to survive and that censorship was necessary to maintain this. The teaching of theologically intolerant religion, for

realization. Many more people probably value democracy intrinsically just because it is their familiar way of life, in the same way they value the stories they read as children or the town in which they grew up. Redish has succeeded in offering one rationale for free speech. It is not the only possible coherent rationale.

Even if it is stipulated that free speech has a single moral basis, the reader must also be willing to accept all the logical implications of that moral basis, however distressing they might be. As we shall see, Redish endorses the results the Court has reached in the campaign finance and tobacco advertising cases.[141] Must we follow Redish to these conclusions?

To see the limitations of his constructivism, consider how he addresses a different problem. Redish argues that the value of self-realization is logically inconsistent with the regulation of obscenity.[142] Self-realization entails that "it is not for external forces—Congress, state legislatures, or the Court itself—to determine what communications or forms of expression are of value to the individual; how the individual is to develop his or her faculties is a choice for the individual to make."[143]

But suppose someone—let's call him Harry[144]—thinks that people, especially young people, can be morally damaged by exposure to obscenity and that this justifies censorship. What leverage could Redish have over Harry? Redish might claim that Harry is being logically inconsistent if he believes in democracy but supports a law that contradicts the premise of self-realization. Harry can reasonably respond (1) that he is not committed to self-realization in the form that Redish presents, (2) that he is not

example, was a danger to the state: "It is impossible to live in peace with people whom one believes are damned." ROUSSEAU, ON THE SOCIAL CONTRACT, *supra*, at 131. He was mistaken at the level of empirical reality, not at the level of high theory.

For modern writers who think that political self-rule is impossible but that elections can nonetheless prevent the worst political abuses, see JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY (3d ed. 1950), and Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328 (1994). The claim that minority domination is inevitable probably cannot be proved or disproved at this high level of abstraction. ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 272–74 (1989).

[141] But not, perhaps, the specific result in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). *See infra* note 413.

[142] REDISH, FREEDOM OF EXPRESSION, *supra* note 110, at 68–76; Redish, *Commercial Speech*, *supra* note 113, at 120.

[143] REDISH, FREEDOM OF EXPRESSION, *supra* note 110, at 69–70.

[144] *See* HARRY M. CLOR, OBSCENITY AND PUBLIC MORALITY: CENSORSHIP IN A LIBERAL SOCIETY (1969); HARRY M. CLOR, PUBLIC MORALITY AND LIBERAL SOCIETY: ESSAYS ON DECENCY, LAW, AND PORNOGRAPHY (1996). The Supreme Court has endorsed a similar view to justify the nonprotection of that subset of pornography it deems "obscene." Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973). Many Americans share Harry's view. In 1981, 56% of Americans supported laws against the distribution of pornography, whatever the age of the purchaser. It has fallen in recent years, but 31% of Americans still held that view in 2010. *See* IPOLL DATABANK, http://webapps.ropercenter.uconn.edu/CFIDE/cf/action/ipoll/ (search for "distribution of pornography") (last visited Mar. 19, 2013) (subscription required).

committed to democracy in the form that Redish presents, or (3) that there are worse things than inconsistency, and the harm caused by obscenity is one of those things. Harry may also think that obscenity is not important to valuable forms of self-realization.

Harry could say that the self-realization to which he is committed is not the freedom to realize yourself in any way you like, but rather the freedom to choose among valuable options. He could say (with Joseph Raz[145]) that there is no value in having the choice of a worthless option or (with John Finnis[146]) that the exercise of practical reason is one among a number of goods and is not a sufficient reason to sacrifice those other goods. He could say that "where 'paternalism' on the part of the political community is justified it is, like the educative function of parenthood itself, to be no more than a help and support to self-correction and self-direction."[147] In other words, he could deem self-realization to be oriented toward a more specific set of goods than Redish posits, and on that basis discern degrees of salience within speech by "draw[ing] lines within the area of communicative conduct based on the same criteria."[148]

2. Redish's Neo-Rawlsian Argument.—If Harry is deemed to be correct about obscenity causing harm, then suppressing obscenity could be deemed necessary to a compelling state interest.[149] But Redish rules this out because the suppression of obscenity "grows out of regulatory hostility toward the moral and socio-political premises implicitly advocated by the obscene communication."[150] The government's purpose in suppressing obscenity is to prevent readers from adopting a relaxed vision of sexual mores. There can never be a compelling state interest in viewpoint discrimination.[151]

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[145] *See* JOSEPH RAZ, THE MORALITY OF FREEDOM (1986).

[146] *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980).

[147] *Id.* at 220.

[148] Farber & Frickey, *supra* note 105, at 1622. Farber and Frickey think that Redish is inconsistent for *not* thus drawing lines, but Redish is committed to the premise that all speech that aids self-realization is of exactly the same value. He is consistent. The question is whether he can compel his readers to accept this premise.

[149] That is why I have thought it worth taking the trouble to show that he is not correct. *See* Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635 (2005) [hereinafter Koppelman, *Does Obscenity Cause Moral Harm?*]; Andrew Koppelman, *Eros, Civilization, and Harry Clor*, 31 N.Y.U. REV. L. & SOC. CHANGE 855 (2007). The present Article grows out of an argument that Professor Redish and I have been having for years over whether the inquiries I pursued in these earlier essays could possibly be relevant to First Amendment adjudication.

[150] Redish, *Commercial Speech*, *supra* note 113, at 120.

[151] Another argument sometimes made in favor of suppressing pornography is that it incites criminal violence against women. The evidence for that proposition is weak. *See* Koppelman, *Does Obscenity Cause Moral Harm?*, *supra* note 149, at 1663–72. But whether or not pornography incites violence does not matter to Redish's theory: "even if one could conclusively establish some connection, regulation would still fail the Supreme Court's test of temporal imminence." Martin H. Redish & Gary Lippman, *Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The*

Censorship on the basis of views like Harry's violates the principle of "epistemological humility," which holds that "no governmental body may impose restrictions on expression on the basis of predetermined moral values."[152] Free speech must be understood to be a closed system. Allowing substantive moral values into free speech doctrine would create "a political jungle in which those in power are able to suppress the expression of those whose views they find deeply offensive."[153]

Redish's argument for epistemological humility is explicitly modeled on Rawls. "First Amendment choices are necessarily made behind a Rawlsian 'veil of ignorance': when choosing a mode of First Amendment construction, one cannot know which particular values will be promoted as a result."[154] When we establish government, "none of us knows who in society will be a part of which moral faction, or which moral faction will be more powerful."[155] Therefore, it is rational for us all to agree to disable government from suppressing speech in the name of its moral vision.

But why should the parties behind Redish's veil of ignorance focus specifically on *speech* as an object of protection? Perhaps they "could reasonably decide that speech is less likely to cause direct or immediate harm to the interests of others and more likely to develop the individuals' mental faculties than is purely physical conduct."[156] This is Redish's explanation for why speech is appropriately singled out for special treatment. But, if the parties are afraid of being tyrannized by other moral factions, then speech protection is not adequate to avoid such tyranny. Why not ban morals laws altogether, or adopt a Nozickian libertarian state, or eliminate the danger of an oppressive state by agreeing to anarchy? Why should the parties behind the veil think that their interest in speaking is weightier than their interest in avoiding exposure to certain kinds of

Ominous Implications, 79 CALIF. L. REV. 267, 308 (1991). I noted earlier that the *Brandenburg* test, which Redish invokes, rests on contestable evaluative and predictive judgments. *See supra* text accompanying notes 95–96. Redish, however, thinks that the demand for imminence rests on "the logic of free speech." Redish & Lippman, *supra*. Does he really believe that even if it were conclusively proven that women were being assaulted by the millions as a direct result of pornography's influence, we would be required by the logic of free speech to tolerate this result?

[152] MARTIN H. REDISH, THE LOGIC OF PERSECUTION: FREE EXPRESSION AND THE MCCARTHY ERA 9 (2005) [hereinafter REDISH, LOGIC OF PERSECUTION]; *see also* REDISH, MONEY TALKS, *supra* note 113, at 6 (describing epistemological humility as the principle that no law-restricting speech may "presuppose substantive moral truth, untied ultimately to the direct or indirect choices of the electorate").

[153] Redish, *Commercial Speech*, *supra* note 113, at 112. Redish frequently makes this rhetorical move, raising the stakes of an isolated question so that unless his answer to that question is accepted, the entire structure of free speech law will be jeopardized. *See infra* text accompanying notes 164, 183, 191, 398, 399, 413, 460.

[154] REDISH, LOGIC OF PERSECUTION, *supra* note 152, at 183.

[155] REDISH, MONEY TALKS, *supra* note 113, at 27.

[156] REDISH, FREEDOM OF EXPRESSION, *supra* note 110, at 19 (footnote omitted).

unwanted speech? Hasn't Redish presumed that the parties behind the veil share his high valuation of freedom of speech?[157]

Unlike Redish, Rawls abstracts for moral, not prudential, reasons. For Rawls, the reason you and I here and now are interested in the original position is that we are trying to devise fair terms of cooperation in which morally irrelevant contingencies of fortune play no role.[158] That is why the parties must be ignorant of their wealth.

The motives for a prudential, neo-Hobbesian veil of ignorance are more contingent than those of Rawls, and so the size and shape of the veil should be contingent as well. (Redish often accuses less speech-protective theorists of being result oriented, but prudential reasoning is *inherently* result oriented.) The parties can allow themselves to know quite a lot about their substantive moral views if they feel reasonably confident that those views will continue to prevail in politics. Redish aspires to a kind of neutrality among contending political values. Neutrality, however, comes in many different forms.[159] Consider religious qualifications for public office. In 1787, non-Christians were officially barred from public office almost everywhere in the United States, and most states barred Catholics as well.[160] This discrimination was paradoxically a kind of neutrality, as for example New Jersey's 1776 constitution, which made eligible for office "all persons, professing a belief in the faith of any Protestant sect."[161] At this time in England, no one who was not a member of the Church of England could hold public office, and those who denied the Trinity could be imprisoned on the second offense.[162] American law operated behind a veil of ignorance about whether one was Anglican or Baptist, but not about whether one was Protestant or Catholic. Americans were afraid of the civic exclusion of Protestants. They weren't much troubled by civic exclusion of Jews or atheists. Contemporary American law bars any requirement that officeholders believe in God.[163] By what prudential argument could the

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[157] That high valuation is particularly clear in Redish's treatment of content-neutral restrictions on expressive conduct, which he would disallow unless the challenged restriction could be shown to be necessary to a compelling government interest. *See id.* at 87–126. In cases where the interest is legitimate but not compelling, the government regulates the challenged conduct for a good reason, but the right to speech overrides that reason. What reason could the parties behind the veil have for giving such great weight to speech interests as against the interests furthered by the challenged law?

[158] *See* JOHN RAWLS, *Justice as Fairness: Political Not Metaphysical* (1985), *in* COLLECTED PAPERS, *supra* note 54, at 388, 402–03.

[159] *See* Koppelman, *The Fluidity of Neutrality*, *supra* note 80.

[160] *See* Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine that Has Gone of Itself*, 37 CASE W. RES. L. REV. 674, 681–83 (1987).

[161] 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1313 (Ben: Perley Poore comp., Washington, Government Printing Office 1877). On the shift toward greater inclusiveness in the American law of religion, see ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY 26–45 (2013).

[162] *See* URSULA HENRIQUES, RELIGIOUS TOLERATION IN ENGLAND, 1787–1833 (1961).

[163] *See* Torcaso v. Watkins, 367 U.S. 488 (1961).

Americans of 1787 have been persuaded to go behind a thicker veil of ignorance? Their fear that perhaps the atheists would be able to seize office and oppress them? Why wouldn't it be sufficient for them to answer that that danger was improbable and that the power they were giving to the state seemed to them an important one?

How much should the parties to the social contract fear the results of state disempowerment? Harry thinks that viewpoint neutrality, if construed to protect obscenity, will produce enormous harm. Any prudential calculation by Harry will take that into account. The same is true of commercial speech or campaign spending by corporations. Any prudential calculus must take into account the harms that will occur if that speech remains unregulated. Perhaps the result will still be protection of speech. But a rational consumer will look at an item's price before buying it.

Redish claims that his rationale "does not represent a firmly held theory of moral epistemology so much as an instrumental construct designed to avoid totalitarianism."[164] But totalitarianism is not a real danger of every authorization of government to censor in the name of a substantive moral vision. The United States has never been as speech protective as Redish wants—people continue to go to jail for distributing obscenity[165]—yet totalitarianism has been avoided. There may be good reasons for objecting to those prosecutions. I think there are.[166] But the objection had better not be a prediction that we are on an inevitable path to Hitler's Germany. Pornography has been prosecuted for a long time without sliding down that slippery slope.[167]

3. Post and the Boundaries of Public Discourse.—Consideration of Robert Post's rival theory on public discourse further elucidates the limitations of Redish's theory. Post has his own blind spots, but he articulates some of the most important dimensions of free speech that Redish neglects.

More than any other contemporary free speech theorist, Post emphasizes the historically situated character of modern free speech law. He observes that it cannot be deduced from first principles and that it is not even well captured by the rules that the Supreme Court has crafted.

> The free-speech jurisprudence of the First Amendment is notorious for its flagrantly proliferating and contradictory rules, its profoundly chaotic collection of methods and theories. Yet, strange to say, those fluent in the law of free speech can predict with reasonable accuracy the outcomes of most

[164] REDISH, MONEY TALKS, *supra* note 113, at 28.

[165] *See* Greg Beato, *In Defense of Extreme Pornography*, REASON.COM (Oct. 27, 2009), http://reason.com/archives/2009/10/27/in-defense-of-extreme-porn.

[166] *See supra* note 149; *see also* Andrew Koppelman, *Reading Lolita at Guantánamo: Or, This Page Cannot Be Displayed*, DISSENT, Spring 2006, at 64.

[167] The basic mistake is treating a slippery slope argument as a logical one, when in fact it is an empirical one. *See* Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985).

> constitutional cases. It seems that what is amiss with First Amendment doctrine is not so much the absence of common ground about how communication within our society ought constitutionally to be ordered, as our inability to formulate clear explanations and coherent rules capable of elucidating and charting the contours of this ground.[168]

To Post, the inherent instability of the ideal of public discourse explains this incoherence. Public discourse has historically emerged as an autonomous sphere that is immune from both government management and the norms of particular communities. Within this sphere, democracy is a negative ideal; "it must refuse to foreclose the possibility of individual choice and self-development by imposing preexisting community norms or given managerial ends."[169] This sounds a lot like Redish. But unlike Redish, Post thinks that public discourse has a specific, collective goal: "to enable the formation of a genuine and uncoerced public opinion in a culturally heterogeneous society."[170]

Post observes that there must be a boundary between public and nonpublic discourse since not every speech act receives First Amendment protection. "[A]ll speech is potentially relevant to democratic self-governance, and hence according to democratic logic all speech ought to be classified as public discourse."[171] That, too, sounds like Redish. But, Post notes, we have other commitments beside public discourse, and public discourse itself depends on some civility norms. Some considerations have considerable weight: material disseminated through mass media is presumptively protected,[172] and the censorship of those media to foster particular communities' civility rules is presumptively improper.[173] But this does not yield a clear code. "The many factors relevant to the classification of speech as public discourse thus resist expression in the form of clear, uniform, and helpful doctrinal rules."[174]

There is a paradox at the boundaries of public discourse: the very effort to distinguish public from private matters is already politically loaded and presupposes controversial criteria about the proper subject of

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[168] Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 153, 153 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) [hereinafter ETERNALLY VIGILANT] (footnote omitted).

[169] POST, *supra* note 109, at 7.

[170] *Id.* at 145.

[171] *Id.* at 175.

[172] *See id.* at 164–73.

[173] *See id.* at 148–50.

[174] *Id.* at 173; *see also* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 18 (2000) (noting that the "common sense" on which the boundaries of public discourse depends is "complex, contextual, and ultimately inarticulate"). Post's critics complain about this vagueness. *See* LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? 139–44 (2005); Redish & Lippman, *supra* note 151, at 302; Redish & Mollen, *supra* note 109, at 1342–48. But they should be disarmed by these statements. Post does not purport to be offering clarity.

politics.[175] Nonetheless, if there is to be a sphere of public discourse, lines must be drawn.

Post's anthropology is imperfect even on its own terms. His account of public discourse is incomplete because he unduly privileges democracy as its basis.[176] He has, perhaps, not fully freed himself from constructivism.[177] Democratic legitimation is perhaps one reason why scientific speech is protected, but it is not the most salient reason, and it cannot explain the protection of instrumental music. Post also cannot explain why private conversations are ever protected.[178] Truth and self-realization evidently play roles that are absent from his account.[179] These omissions suggest that Schauer was right: we have several different First Amendments, and Post has described only one of them.

Post's analysis nonetheless poses a challenge to any tunnel constructivist free speech theory. Post claims that "[t]he aspiration to be free from the constraints of existing community norms (and to attain a consequent condition of pure communication) is in tension with the aspiration to the social project of reasoned and non-coercive deliberation."[180] Rational deliberation presupposes norms of civility. If the law cannot sustain these norms, then "public discourse corrodes the basis of its own existence."[181] Such paradoxes confound the aspiration to a simple deductive theory. They suggest that, as we shall see when we examine Milton and Mill, any free speech regime will be justified, not by its theoretical elegance (which is not to be had), but by the vibrant public discourse it fosters.

4. Redish and the Boundaries of Public Discourse.—Redish avoids Post's paradox because he thinks the ban on viewpoint discrimination prohibits any civility-based restriction on speech.[182] An injunction against a Nazi march in a town heavily populated by Holocaust survivors, for example, would be "normative censorship by those in power," which is "a result wholly inconsistent with the foundations and premises of a democratic society."[183] When the point is put that broadly, it necessarily

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[175] *See* POST, *supra* note 109, at 147, 268.

[176] In this, Post agrees with Redish. *See* Robert C. Post, *Viewpoint Discrimination and Commercial Speech*, 41 LOY. L.A. L. REV. 169, 175 (2007).

[177] Stanley Fish argues that this kind of theoretical tidying up is inconsistent with Post's anthropological method. Stanley Fish, *The Dance of Theory*, *in* ETERNALLY VIGILANT, *supra* note 168, at 199, 205.

[178] Redish & Mollen, *supra* note 109, at 1347–48.

[179] Nor does he discuss the importance of a character ideal, even though that has played a large role in developing the ideal of public discourse.

[180] POST, *supra* note 109, at 147.

[181] *Id.*

[182] Redish & Lippman, *supra* note 151, at 292–94, 297–304.

[183] Redish, *Commercial Speech*, *supra* note 113, at 113.

applies not only in Skokie, but in Berlin and Vienna as well. Nazi speech is, of course, censored in Germany and Austria,[184] but it does not follow that those countries are not democracies.[185] Redish must offer some evidence that public discourse does not depend on civility norms as Post claims. He presents no such evidence, nor any interest in such evidence. Since his argument is a pure deduction from democratic theory, there does not appear to be any way in which the evidence could matter.[186] Rawls worried about the stability of liberal institutions.[187] Redish takes that stability for granted.

Redish disagrees with Post's view that hard questions are raised by *Hustler Magazine, Inc. v. Falwell*.[188] The case decided a lawsuit for intentional infliction of emotional distress caused by *Hustler* magazine's publication of a parody advertisement portraying an incestuous encounter between the Rev. Jerry Falwell and his mother.[189] The Supreme Court held

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[184] *See* LEGISLATING AGAINST DISCRIMINATION: AN INTERNATIONAL SURVEY OF ANTI-DISCRIMINATION NORMS 328–30 (Nina Osin & Dina Porat eds., 2005) (German statutes); *id.* at 86–88 (Austrian statutes); *see also* BARENDT, *supra* note 86, at 166–67; Walter F. Murphy, *Excluding Political Parties: Problems for Democratic and Constitutional Theory*, *in* GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE—A GERMAN-AMERICAN SYMPOSIUM 173 (Paul Kirchhof & Donald P. Kommers eds., 1993).

[185] In 1952, 37% of Germans agreed that "it would be better for Germany not to have any Jews in the country," while only 20% disagreed. DAVID ART, THE POLITICS OF THE NAZI PAST IN GERMANY AND AUSTRIA 55 (2006). In 1953, 55% of Germans disagreed with the statement that "German soldiers of the last war can be reproached for their conduct in the occupied countries." *Id.* (Thanks to Susan Scarrow for directing me to this volume.) Neither of these questions concerned free speech, but both answers are probative of the difficulties of creating a liberal, speech-protective culture in postwar Germany.

Nor is it clear that what legitimates constitutional restrictions on democratic decisionmaking is that such restrictions are subject to democratic repeal. *See* REDISH, MONEY TALKS, *supra* note 113, at 28. First, even in America, constitutional amendment is not possible without surmounting Article V hurdles that hamstring the capacity of present majorities to enact their will. For a majoritarian objection to this state of affairs, see Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988). Second, it is far from clear that some legally permissible exercises of that will, such as the reinstitutionalization of slavery, would be consistent with democracy.

A democracy is, of course, better functioning if respect for individual rights emerges from an unfettered electoral process rather than being imposed from above. *See* COREY BRETTSCHNEIDER, DEMOCRATIC RIGHTS: THE SUBSTANCE OF SELF-GOVERNMENT 136–59 (2007). But that point does not dictate that the German–Austrian approach is wrong, in context.

[186] At one point, however, he responds by shifting the burden of proof to Post: if civility is allowed to limit public discourse, "we would suffer concrete, unambiguous limitations on public discourse, without any assurance that the sum total would ultimately represent a net gain to public expression." Redish & Lippman, *supra* note 151, at 300. Redish concedes that it is possible that Post is right and simply demands more evidence than Post provides. However, he does not engage with Post's evidence, instead summarily dismissing "the citation of sweeping, wholly unsupported assertions by sociologists." *Id.* at 294.

[187] *See* FREEMAN, *supra* note 60, at 163–66.

[188] 485 U.S. 46 (1988).

[189] *Id.* at 48.

that the parody was protected because Falwell was a public figure.[190] Redish thinks this was an easy case: a ban on any kind of offensive speech violates the prohibition on viewpoint discrimination. Any concession to civility rules would "sweep frighteningly far, with no apparent logical stopping point to prevent the eventual wholesale destruction of speech values."[191] Post notes, however, that the Court limited its holding to the abuse of public figures.[192] The result might have been different if *Hustler*, for its target, "had picked a private person's name at random from the telephone directory."[193] (Fortunately for *Hustler*, Falwell's mother died before the advertisement was published; it is far from clear that the Court would have reversed if she had been the plaintiff.)[194] Redish cannot make that concession.[195] He aspires to a world where citizens can heap abuse on one another with no fear of tort liability. Perhaps protecting Falwell's mother is bad for the community because "squelching speech actually has the effect of decreasing inclusiveness in the deliberative project."[196] But Redish has shown us no reason to believe that.

Redish implicitly concedes that public discourse depends on some shared public values. In his most recent work, he acknowledges that democracy, even a conception of "adversary democracy" that envisions endless conflict, presupposes some level of community: a common commitment to "the peaceful resolution of disputes and a continuation of the commitment to the democratic process."[197] He assumes this commitment can be maintained without restricting much speech and that, as Post describes the assumption, "community life is constituted by the voluntary choices of its members."[198]

Redish's implicit rejection of Post's paradox requires evidence about what in fact holds liberal communities together. It cannot be deduced from democratic theory. The idea that liberal aspirations are all you need to maintain community has its attractions—the idea that America stands for

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[190] *Id.* at 56–57.

[191] Redish & Lippman, *supra* note 151, at 302.

[192] POST, *supra* note 109, at 127.

[193] *Id.* at 375 n.50.

[194] It may be clearer what the result would be today after *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), which indicated that even private figures may be subjected to this kind of abuse with impunity.

[195] Redish does defend the distinction between public and private figures made in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), opining that it is reasonable to hold that the "defamation of an individual who has voluntarily entered the public arena is more tolerable than similar harm inflicted upon one who has assumed no risk." REDISH, FREEDOM OF EXPRESSION, *supra* note 110, at 81. But he has not extended this reasoning to intentional infliction of emotional distress.

[196] Redish & Lippman, *supra* note 151, at 301 (emphasis omitted).

[197] Redish & Mollen, *supra* note 109, at 1370; *see also id.* at 1352, 1354 n.234. This aspect of adversary democracy is not discussed in Martin H. Redish & Elana Nightingale Dawson, *"Worse than the Disease": The Anti-Corruption Principle, Free Expression, and the Democratic Process*, 20 WM. & MARY BILL RTS. J. 1053 (2012).

[198] POST, *supra* note 109, at 138.

liberty is potent[199]—but it depends on local conditions.[200] Redish is in no position to say what democracy requires in Berlin. That weakens his authority to describe what democracy entails, even in the United States. Redish dismisses Post's free speech anthropology as irrelevant to normative theory,[201] but he evidently has, and needs, an anthropology of his own.

The argument for civility norms does not only rest on the paradox of public discourse. In part, it also rests on a substantive judgment that, even if the community could go on functioning while it tolerates these injuries, it should not have to. Falwell's mother should not have to put up with abusive parodies, even if the civic consequences (for everyone else!) of subjecting her to them are not especially severe.[202]

The same point applies to some racist speech.[203] For example, when a black customer returns merchandise to a store and is required to sign a slip stating, "Arrogant Nigger refused exchange—says he doesn't like products," is it really necessary that the First Amendment bar recovery for intentional infliction of emotional distress?[204] It depends on whether there exists any category of words "which by their very utterance inflict

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[199] For a particularly strong and succinct statement of the ideal of a liberal community, see 4 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING 108–13 (1988). Redish sometimes relies on this ideal. Responding to a well-known epigram by Justice Stevens, he writes that "we are willing to send our sons and daughters off to war, presumably to protect the right of each individual to decide what books he or she will read and what movies he or she will see, free from the state's power to determine that such forms of communication are 'worthless.'" REDISH, FREEDOM OF EXPRESSION, *supra* note 110, at 72. It is a telling point, but Redish would need to say more than he does about the conditions under which this liberal ideal can attract the allegiance of citizens.

At one point, Redish concedes the interdependent relation of community and individual:

> A vibrant self-governing community cannot function successfully unless individual citizens are themselves intellectually active and respected members of that community. Although theorists may differ over which is the ends and which is the means, it is clear that individual integrity and democratic community are intertwined in a symbiotic relationship.

REDISH, MONEY TALKS, *supra* note 113, at 24 (footnote omitted).

But Redish's specifications of both individual integrity and democratic community are far vaguer and more abstract than Post's.

[200] Thomas Jefferson famously stated the optimistic thesis in ringing tones: "If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it." THOMAS JEFFERSON, First Inaugural Address (Mar. 4, 1801), *in* WRITINGS 492, 493 (Merrill D. Peterson ed., 1984). Sixty years later, the harmlessness of such views became less obvious.

[201] Redish & Lippman, *supra* note 151, at 294; Redish & Mollen, *supra* note 109, at 1333.

[202] This is Justice Alito's view. *See* Snyder v. Phelps, 131 S. Ct. 1207, 1222 (2011) (Alito, J., dissenting).

[203] I agree with Redish that most racist speech should be protected in American law, but my reasons are more local and contingent than his. *See* ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 220–65 (1996).

[204] The facts are taken from *Irving v. J. L. Marsh, Inc.*, 360 N.E.2d 983, 984 (Ill. App. Ct. 1977), which denied recovery, *id.* at 986. The court did not discuss the First Amendment.

injury."[205] It is obvious that such a category exists in lived reality. The question is whether the First Amendment permits us to act on that.[206]

A similar point can be made about speech in the sphere of management. Sometimes the law "organizes social life instrumentally to achieve specific objectives,"[207] and speech is restricted in the furtherance of those ends. One example is the enforcement of professional norms of truth and competence: dentists are forbidden to give certain advice to patients even if they sincerely believe it to be correct because the state dental association regards such advice as false and irresponsible.[208] Full protection of such speech (which *would* be fully protected if the dentist published it in a book) would sacrifice the legitimate goals of averting harm and guaranteeing competent services. In professional–client relations, assuming the full autonomy and competence of the patient would be tantamount to "masking particularly intolerable conditions of private power and domination."[209] Sometimes paternalism, even paternalistic interference with speech, makes us freer. And so an understanding of free speech that absolutely bars such interference would make us more vulnerable to manipulation and abuse and thus less free.

Redish, however, rejects the idea of speech that is "constitutionally regulable per se."[210] It is not clear whether this means all speech should be presumptively protected: Redish has never confronted the problem that free speech is not even salient with respect to perjury, price-fixing, conspiracy, and many other acts requiring words.[211] Yet Redish appreciates how destructive some speech can be, and so he proposes that free speech rights "must give way only in the presence of a truly compelling governmental interest."[212] Sometimes, the result will not be very different from the categories of speech protection in present doctrine, such as the rules of *New York Times v. Sullivan* and *Brandenburg v. Ohio*.[213] But Redish vehemently denies that different levels of speech get different levels of protection. The

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[205] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[206] Redish quotes this passage of *Chaplinsky*, but in the ensuing discussion he considers "fighting words" as regulable only if they are likely to lead to a disturbance of the peace. *See* REDISH, FREEDOM OF EXPRESSION, *supra* note 110, at 55–57. Steven Heyman argues that the same rights-based conception that supports free speech can also entail protection from some personal abuses, regardless of whether they are likely to lead to violence. STEVEN J. HEYMAN, FREE SPEECH AND HUMAN DIGNITY 142–46 (2008).

[207] POST, *supra* note 109, at 2.

[208] Post, *supra* note 176, at 171–72. Post uses the example of a dentist's advice to replace "mercury amalgam fillings with gold or composition fillings." *Id.* at 171. Most dentists believe that this procedure subjects patients to considerable risk for no discernable benefit.

[209] POST, *supra* note 109, at 284.

[210] REDISH, FREEDOM OF EXPRESSION, *supra* note 110, at 56.

[211] *See* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004).

[212] REDISH, FREEDOM OF EXPRESSION, *supra* note 110, at 55.

[213] *Id.* at 119; *see also supra* notes 95–105 and accompanying text.

same result is accomplished through the prudent calibration of compelling state interests.

I am not persuaded that this reconstruction of doctrine advances understanding. In the first place, the flattening of all speech to one level is implausible. Farber and Frickey charge Redish with "a radical telescoping of values, in which a political dissenter can no longer be distinguished from a Mafia boss giving orders to a hit man."[214] This criticism is not fatal because constructivism always aims for a radical telescoping of values. It abstracts away from ideals, paradigmatically religious ideals, that may be deeply felt but must be politically irrelevant. (Rawls claimed that the "intuitive idea" of his theory was "to generalize the principle of religious toleration to a social form.")[215] But is this particular telescoping what free speech requires? Redish, of course, does not really believe that there is no difference in the value of a dissenter's speech and that of the Mafia boss. He merely thinks that "epistemological humility" requires that we not draw any such distinction *for free speech purposes*. But as we have seen, the neo-Hobbesian argument for such abstinence does not work.[216]

Redish's success in reconstructing so much of free speech doctrine unchanged, together with the conceded malleability of his compelling interest test,[217] suggests that he is trying to preserve his theory in the face of substantial evidence to the contrary. Just as you can reconcile the data with the Ptolemaic theory that the sun revolves around the Earth so long as you are willing to construct complex equations and add some assumptions about invisible forces, you can preserve Redish's free speech theory by manipulating the compelling interest test. But these are complicated ways to account for phenomena that have much simpler explanations.[218]

Redish makes many effective arguments for a broadened conception of free speech, and the Supreme Court is coming round to his view. However, he misconstrues the source of his own power. His arguments sometimes persuade not because they are deductions from unchallengeable premises,

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[214] Farber & Frickey, *supra* note 105, at 1623.

[215] RAWLS (1971), *supra* note 40, at 206 n.6; RAWLS (1999), *supra* note 40, at 180 n.6; *see also* RAWLS (1971), *supra* note 40, at 220; RAWLS (1999), *supra* note 40, at 193. Other proponents of liberal neutrality toward ideals of the good have described their project in similar terms. *See* BRUCE A. ACKERMAN, RECONSTRUCTING AMERICAN LAW 99 (1984); GERALD F. GAUS, JUSTIFICATORY LIBERALISM: AN ESSAY ON EPISTEMOLOGY AND POLITICAL THEORY 170 (1996); CHARLES LARMORE, THE MORALS OF MODERNITY 144 (1996).

[216] *See supra* notes 159–67 and accompanying text.

[217] By a "compelling interest," he means not a "standard incapable of compliance," but rather "a matter of truly vital and important concern." REDISH, FREEDOM OF EXPRESSION, *supra* note 110, at 119. This will sometimes generate categorical rules, but sometimes it demands ad hoc balancing with a "'thumb on the scales' in favor of free speech." *Id.* at 120.

[218] It is also worth noting that in some cases, the desired result cannot be reached because the Court has given different levels of protection to speech in cases where it has said that the state interest is exactly the same. *See* Post, *supra* note 174, at 29–30.

but because they offer considerations, rooted in liberal ideals of autonomy, in favor of protection—considerations that must however be weighed against (and sometimes really do outweigh) the enormous heterogeneous lot of considerations on the other side of any particular question. Redish's own rhetorical appeal itself stands in the tradition we have been describing and has unacknowledged roots in the substantive ideals first formulated by Milton and Mill. His theory depends on an aspiration to a certain kind of independence and power, the free and self-determining individual, which is itself quite historically specific.[219]

His arguments on behalf of unregulated campaign finance and commercial speech, which I'll discuss shortly, are not deductions from unquestionable premises, but appeals to this ideal. Those appeals show that such speech is salient for free speech purposes. It does not follow that the speech's salience equals that of other speech or that the state interests involved are not stronger here.

Both Redish and Rawls seek to offer accounts of liberty that are insulated from the contingency of contesting political views. Neither can completely achieve that insulation because there is no secure Cartesian anchor for their arguments. Rawls understands this. Does Redish?

B. The New Negative Tunnel Constructivism

In recent years, there has been a second wave of tunnel constructivism. Larry Alexander and Stanley Fish have each argued that because no sound constructivist account of free speech is possible, free speech theory is a misguided project.

Alexander asks whether free speech can coherently be regarded as a human right, by which he means "a moral right that exists apart from any particular legal or institutional arrangement."[220] He is looking for "a negative liberty right of a deontological, not indirect consequentialist, nature."[221] He capably shows that free speech cannot be shown to be such a right. Like Redish, he thinks epistemic abstinence is the foundation of free speech, but unlike Redish, he thinks such abstinence is impossible.[222] Any speech theory must be founded on substantive moral commitments.

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[219] Charles Taylor observes that the modern tendency to privilege radical choice, unconstrained by any source of value outside the act of choice itself, arises from a description of the human situation in which there is a plurality of valid moral visions that are impossible to adjudicate. This gives rise to a specifically modern ideal of authenticity. "Granted this is the moral predicament of man, it is more honest, courageous, self-clairvoyant, hence a higher mode of life, to choose in lucidity than it is to hide one's choices behind the supposed structure of things, to flee from one's responsibility at the expense of lying to oneself, of a deep self-duplicity." CHARLES TAYLOR, *What is Human Agency?*, *in* 1 PHILOSOPHICAL PAPERS: HUMAN AGENCY AND LANGUAGE 15, 33 (1985).

[220] ALEXANDER, *supra* note 174, at 3.

[221] *Id.* at 6.

[222] *Id.* at 147.

Alexander infers that judges have no business enforcing most of contemporary free speech law because the case for doing so is too speculative.[223] But perhaps judges should protect free speech because speech is a value worth protecting, and the courts are, at least in this department, less untrustworthy than the other branches of government.[224]

Alexander concludes that "[t]here is no human right of freedom of expression," even though he concedes that "[t]here are many good reasons for governments not to regulate expression for the purpose of affecting messages."[225] This way of putting it presumes that human rights are made out of some material other than good reasons. The reasons to allow expression "will always be limited, local, and based on hunches about consequences."[226] But across a broad range of cultural circumstances, it is good, perhaps even morally urgent, to grant a legal right to free speech. A human right need not be more elevated than that.[227]

Stanley Fish similarly claims that "there is no such thing as free speech" because any argument for free speech must state the purpose of a speech-protective regime, and once that purpose has been specified, "it becomes possible to argue that a particular form of speech, rather than contributing to its realization, will undermine and subvert it."[228] Fish's point is devastating if and only if free speech cannot tolerate exceptions or, more generally, if liberalism must present itself as viewpoint neutral, "the principle of a rationality that is above the partisan fray."[229] If liberalism is a substantive position that can frankly acknowledge itself as such, then Fish's objections lose their force.

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[223] *Id.* at 185–93.

[224] The best exposition of this argument is still Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 896–99, 903–07 (1963). The claim is a contingent one, and it was not true for most of American history. Until the mid-twentieth century, popular culture was often supportive of free speech claims, while courts were overwhelmingly hostile. *See generally* CURTIS, *supra* note 89; LEVY, *supra* note 87; RABBAN, *supra* note 86. Today, on the other hand, courts are routinely presented with cases in which some legislative actor has repressed speech in ways that are clearly impermissible under judicially crafted law. *See* Adam Winkler, *Free Speech Federalism*, 108 MICH. L. REV. 153 (2009).

[225] ALEXANDER, *supra* note 174, at 193.

[226] *Id.*

[227] James Griffin, for example, argues that human rights are tools devised to protect persons in their capacity as agents who can choose and pursue a conception of the good life. Among those tools are the basic necessities of life and liberty from unwarranted interference. *See* JAMES GRIFFIN, ON HUMAN RIGHTS (2008). Free speech, although Griffin barely mentions it, might merely be a tool of this kind. Similarly, Jeremy Waldron suggests that "an argument counts as right-based just in case it takes the moral importance of some individual interest as a reason for assigning duties or imposing moral requirements." JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 25 (1988).

[228] STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO 13–14 (1994).

[229] *Id.* at 137.

Fish understands this perfectly well. I do not take Fish to disagree with the thesis of this Article. On the contrary, he states it nicely: "Speech . . . is never a value in and of itself but is always produced within the precincts of some assumed conception of the good to which it must yield in the event of conflict."[230] Like me, he argues that any defense of free speech must follow the model of Milton's *Areopagitica*.[231] His book's title, *There's No Such Thing as Free Speech and It's a Good Thing, Too*, is a silly caricature of his position, but it is so provocative that evidently he couldn't resist using it.

Fish's great weakness as a free speech theorist is that he is so obsessed with refuting, over and over again, the pretensions of tunnel constructivism that he never gets around to saying what the actual modern practice of free speech is, why it is valuable, or how the law ought to promote it. That practice, as it happens, consists in significant part of protecting the expression of views that we substantively reject, such as racism. There are excellent reasons for doing this that have nothing to do with tunnel constructivism, but Fish is blind to them.[232] In that sense, his title is accurate: there is no such thing as free speech between the covers of his book.

These skeptical views depend on the assumption that free speech discourse must rest on constructivist deduction. Until the 1970s, however, defenses of free speech weren't done that way at all.

IV. FREE SPEECH AS A PRACTICE

A. Healthy, Robust Debate

Albert Jonsen and Stephen Toulmin observe that in contemporary philosophy there is a deep conflict between "two very different accounts of ethics and morality: one that seeks eternal, invariable principles, the practical implications of which can be free of exceptions or qualifications, and another, which pays closest attention to the specific details of particular moral cases and circumstances."[233] Jonsen and Toulmin are proponents of the latter approach, which they find in the medieval tradition of casuistry. There is, they think, no "ethical algorithm"[234] that can provide definitive answers to moral questions. Rather, the locus of moral certitude, to the

[230] *Id.* at 104. That conception of the good may, however, be one that incorporates free speech as an integral part. (As we shall see, Milton and Mill are examples.) Even in such a case, the value of free speech is unlikely to override all other considerations.

[231] *Id.* at 102–04.

[232] The closest Fish comes to endorsing any judicial test for First Amendment protection is an approving citation of Learned Hand's lamentable opinion in *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951). *See* FISH, *supra* note 228, at 127.

[233] JONSEN & TOULMIN, *supra* note 74, at 2.

[234] *Id.* at 7.

extent it exists, lies in a "shared perception of what [is] *specifically* at stake in particular kinds of human situations."[235] Persuasive moral argument is less likely to be a deduction from inescapable premises than a rich description of the specific situation at hand.

Ethics, according to Jonsen and Toulmin, is less like logic than it is like clinical medicine. Medical practice is in part dependent on a general scientific knowledge of diseases and their treatment. But it also depends on the capacity to recognize specific syndromes and to reason by analogy from past cases to the present problem. "[A]ll diagnostic conclusions are tentative and open to reconsideration if certain crucial symptoms or circumstances have been overlooked or the later course of the illness brings important new evidence to light."[236]

Medical judgments are teleological; they are oriented toward the end of health.[237] Medicine is a result-oriented, value-laden enterprise because "health" is a contested concept. Sickness is deviancy from a norm, but the norm is not given by nature. The "blight" that strikes corn is labeled a disease because humans want the corn crop to survive; otherwise we would just talk about the competition between two species.[238] Health is simply a

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[235] *Id.* at 18.

[236] *Id.* at 42.

[237] Here I follow Alasdair MacIntyre, who defines a "practice" as:

> any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended.

ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 187 (2d ed. 1984). Practices, as MacIntyre understands them, don't have essences; they have histories.

"A practice," MacIntyre observes, "involves standards of excellence and obedience to rules as well as the achievement of goods. To enter into a practice is to accept the authority of those standards and the inadequacy of my own performance as judged by them." *Id.* at 190. Those standards of excellence can be virtues: "A virtue is an acquired human quality the possession and exercise of which tends to enable us to achieve those goods which are internal to practices and the lack of which effectively prevents us from achieving any such goods." *Id.* at 191 (emphasis omitted).

The practice of free speech as I describe it in this Article is historically situated within the liberal tradition. However, MacIntyre thinks that understanding the historical context entails skepticism: "[E]ach tradition . . . is unable to justify its claims over against those of its rivals except to those who already accept them." ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 348 (1988) [hereinafter MACINTYRE, WHOSE JUSTICE?]. Liberalism itself, he claims, is a tradition in precisely this predicament. *Id.* at 335. "[N]o tradition can claim rational superiority to any other." *Id.* at 348. However, one need not go that far to accept MacIntyre's description of how traditions operate and his characterization of liberalism as a tradition. That liberalism is a tradition does not mean we cannot discuss its merits. But we must know how liberal practice operates before we can ask whether its ends are appropriately universalized.

[238] *See* RONALD BAYER, HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS 183–86 (rev. ed. 1987).

desirable state of affairs.[239] To take a lately familiar example in the area of human health, new treatments, such as Viagara and Cialis, have been devised to address age-related male sexual dysfunction. Prominent people as different as Hugh Hefner and Robert Dole enthusiastically endorse these treatments.[240] The treatments presuppose, however, that sexual function is something that is desirable in the aging male. Plato's *Republic* reports a conversation in which someone asked the tragedian, "Sophocles, how are you in sex? Can you still have intercourse with a woman?" Sophocles reportedly responded, "Silence, man . . . . Most joyfully did I escape it, as though I had run away from a sort of frenzied and savage master."[241] The "dysfunction" was to Sophocles no disease at all.

There is no way to settle the dispute between Sophocles and Hefner. It turns on fundamentally different conceptions of a good human life. (If you are not moved by this example, consider contemporary disagreements about how the psychiatric profession should address homosexuality.) The disagreement does not mean that it is impossible to have a coherent practice of medicine. But it does mean that the purposes of medicine cannot be deduced from first principles, and neither can the appropriate treatment for any particular patient.[242] The actual practice of medicine will be embedded in a way of life with distinctive values.

This shift in conceptions of health shows that Jonsen and Toulmin's call for a revival of casuistry fails to describe an important element of situation-specific practical reason. Assessment of particular situations will depend on the diagnostician's values. These values will be uncontroversial only to the extent that those who assess the diagnostician's work share his world view.[243]

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[239] *See* Dominic Murphy, *Concepts of Disease and Health*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2008), *available at* http://plato.stanford.edu/entries/health-disease/.

[240] *See, e.g.*, Bryce Traister, *Academic Viagra: The Rise of American Masculinity Studies*, 52 AM. Q. 274, 285, 302 n.24 (2000); Brooks Barnes, *The Loin in Winter: Hefner Reflects, and Grins*, N.Y. TIMES, Oct. 24, 2009, at A1 (late edition).

[241] 1 PLATO, THE REPUBLIC 329c, at 5 (Allan Bloom trans., 2d ed. 1991).

[242] Aristotle's methodological warning is pertinent here:

> Our discussion will be adequate if it has as much clearness as the subject-matter admits of, for precision is not to be sought for alike in all discussions, any more than in all the products of the crafts. . . . We must be content, then, in speaking of such subjects and with such premisses to indicate the truth roughly and in outline, and in speaking about things which are only for the most part true, and with premisses of the same kind, to reach conclusions that are no better. In the same spirit, therefore, should each type of statement be *received*; for it is the mark of an educated man to look for precision in each class of things just so far as the nature of the subject admits; it is evidently equally foolish to accept probable reasoning from a mathematician and to demand from a rhetorician demonstrative proofs.

ARISTOTLE, THE NICOMACHEAN ETHICS bk. I.3, at 2–3 (J.L. Ackrill & J.O. Urmson eds., David Ross trans., Oxford Univ. Press 1998) (c. 384 B.C.E.).

[243] As MacIntyre explains, "each theory of practical reasoning is, among other things, a theory as to how examples are to be described, and how we describe any particular example will depend, therefore, upon which theory we have adopted." MACINTYRE, WHOSE JUSTICE?, *supra* note 237, at 333.

Freedom of speech, and specifically the construction of constitutional rules that protect it, is a practice much like medicine. It aims to preserve a system of public discourse that facilitates the realization of the goods internal to the practice and to protect it from pathologies that impair its proper operation. As in medicine, however, what counts as the "proper operation" of the pertinent system can only be determined by reference to value judgments.

The values that free speech serves are mutually reinforcing. Self-realization, democracy, and free speech all support one another. Rich community life, individual autonomy, and scientific advancement are likewise reasons to support free speech.[244] As with health, the goal of the practice is a complex of goods.

I cannot foster an appreciation of the value of this practice, however, with a series of deductions from first principles. Instead, I must say, with Bernard Shaw, "I do not address myself to your logical faculties, but as one human mind trying to put himself in contact with other human minds."[245] I need to make you appreciate the substantive attractiveness of the kind of community that I am trying to create, a community that tolerates a broad range of expression. This is a problem less of logic than of rhetoric.[246] Addressing this rhetorical problem was the aim of every major defender of free speech before the constructivists.

Free speech is a distinctive cultural formation that developed at a particular point in history. It is not a necessary implication from democracy, the search for truth, autonomy, or anything else. It is a political ideal, with roots in the Protestant Reformation, aimed at particular qualities of character among citizens and a particular type of institution of public discourse.

As with medicine, the conception of healthy discourse shifts over time. The rhetorical power of any defense of free speech depends on its audience accepting the normative attractiveness of the defense's animating ideals.

MacIntyre is right only if he means "theory" broadly to include any framework for understanding what matters in human life. Most people engage in practical reasoning and thereby display what they think is most important to them, while remaining innocent of "theory" as it is practiced in philosophy departments and law schools. *See* CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY 21 (1989). MacIntyre and Taylor disagree about how serious a problem this is. *See* Alasdair MacIntyre, *Critical Remarks on* The Sources of the Self *by Charles Taylor*, 54 PHIL. & PHENOMENOLOGICAL RES. 187 (1994).

[244] Farber & Frickey, *supra* note 105, at 1640.

[245] BERNARD SHAW, *The New Theology* (1907), *reprinted in* THE PORTABLE BERNARD SHAW 304, 305 (Stanley Weintraub ed., 1977).

[246] Robert Tsai documents in detail the ways the Supreme Court has used rhetoric and metaphor to justify the development of a robust law of free speech in his impressive book *Eloquence and Reason*. *See* TSAI, *supra* note 111. It is also likely that the self-serving claims of opportunistic legal and political actors explain some of the free speech terrain. *See* Schauer, *supra* note 211; Frederick Schauer, *First Amendment Opportunism*, *in* ETERNALLY VIGILANT, *supra* note 168, at 175.

These ideals compete with other desiderata that are no less worthy of attention or allegiance. This idea is similar to the context-specific "practical reason" advocated by Farber and Frickey, though I emphasize that this reasoning is to be employed in the construction of rules that will govern future cases, rather than a particularistic judgment in every case.[247] Redish objects that Farber and Frickey do not "explain how one actually goes about attempting to resolve a specific case on the basis of practical reason,"[248] and concludes that their approach "free[s] a reviewing court from the bonds of reason, consistency, and predictability that inherently characterize principled decision making"[249] and "ultimately amounts to a form of non-rational subjectivism and intellectual chaos."[250] The only way to answer Redish's claim that there is no coherent alternative to tunnel constructivism is to show that such an alternative exists and that it can produce a workable and speech-protective regime.

There are, of course, many human practices that treat like things alike but that cannot be reduced to algorithms: medicine is not merely nonrational subjectivism and intellectual chaos. But is it possible for free speech protection to be like medicine in this respect? To show that it is, I will examine the tradition of speech-protective argument that thrived for more than 300 years before the advent of constructivist theories.

I will begin with an analysis of the classic defenses of free speech by Milton and Mill, early American practice, and brief but very influential discussions by Justices Holmes and Brandeis. I will then consider the most prominent free speech theorist of the 1960s, Thomas Emerson, and other leading theorists from that period. None of these authors are constructivists, and all embrace substantive political and moral goals in ways that constructivists would find anathema. The tradition shows that it is possible to have a robust defense of free speech that is not at all constructivist.

B. Milton

The earliest articulation of the ideal of free speech,[251] in which the basic elements are already visible, is John Milton's 1644 pamphlet *Areopagitica*. In 1641, during the struggles leading up to the English civil war, Parliament abolished the Court of Star Chamber. Until then, one

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[247] *See* Farber & Frickey, *supra* note 105, *passim*. For criticism, see Redish, *Commercial Speech*, *supra* note 113, at 96–106, and Schauer, *supra* note 106, at 398 n.3.

[248] Redish, *Commercial Speech*, *supra* note 113, at 99.

[249] *Id.* at 101.

[250] *Id.* at 105.

[251] I agree with John Durham Peters that the call to tolerate speech that articulates evil ideas for the sake of a greater good was present much earlier in Socratic dialogue, Jewish Torah study and Talmudic commentary, and the epistles of St. Paul. None of these texts, however, attempted anything like the creation of a legal doctrine that protects speech. *See* PETERS, *supra* note 102, at 29–67. Milton, on the other hand, addresses state actors and calls for a reform of the law.

needed a license from the Star Chamber to publish legally. The Chamber's abolition was primarily aimed at depriving King Charles I of his most potent means of exercising arbitrary power over his adversaries. An unintended side effect was the removal of all restrictions on printing: "The immediate result was a flourishing of political and religious ideas the likes of which England had never before experienced. . . . By one count, the number of pamphlets published during the year 1640 was 22; in 1642, it was 1,966."[252]

In August 1642, Charles I gathered his troops at Nottingham for the coming war against Parliament. Fighting began in October.[253] Parliament, concerned about royalist propaganda, its own unity, and also about the proliferation of heretical religious opinions, decided to reinstitute licensing in June of 1643. It was this licensing law that elicited Milton's protest.

Milton developed a positive account of the benefits of free speech, which redounded to both the individual and society in reciprocal fashion. Protestant assumptions—assumptions that continue to influence modern thought about free speech—pervaded Milton's account of those benefits.

At the core of Milton's account rested a Christian ideal of individual perfection. This ideal rested on a distinct conception of virtue as the ability to face and overcome temptation. It demanded that each person grasp religious truth inwardly, not just by outward show. The truth that was to be pursued also had distinctive characteristics: it was permanently elusive and would emerge over time as a consequence of the collision of opposing ideas in a regime of unfettered discourse. Roman Catholicism's core error was the idea that truth was fixed once and for all, and that it could be advanced by blind allegiance to authority.

This ideal of individual perfection led in turn to a distinct conception of society. Human society was to be understood as unified not by unanimity concerning any particular proposition, but rather by the common will to pursue truth together. The benefits of truth thus attained greatly outweighed any harms caused by error, and, in fact, error itself contributed to the emergence of truth. Because what drove the whole program was a vision of the goods achievable through discourse, that vision did not entail the limits of the tolerable, and, in fact, Milton offered little explanation for drawing the line where he did.

Milton's theology is key to understanding his claims about free speech. He radicalized the Protestant insistence on the unmediated communion between man and God. Even correct religious doctrine could not deliver salvation if it was the consequence of blind conformity rather than active engagement with religious questions: "A man may be a heretic in the truth; and if he believe things only because his pastor says so, or the

[252] Vincent Blasi, *Milton's* Areopagitica *and the Modern First Amendment* 2–3 (Yale Law Sch. Occasional Papers, Paper No. 6, 1995), *available at* http://lsr.nellco.org/yale/ylsop/papers/6.

[253] CHRISTOPHER HILL, THE CENTURY OF REVOLUTION, 1603–1714, at 95 (2d ed. 1980).

Assembly so determines, without knowing other reason, though his belief be true, yet the very truth he holds becomes his heresy."[254]

Religious salvation was to be achieved only by struggle against temptation. "Assuredly we bring not innocence into the world, we bring impurity much rather: that which purifies us is trial, and trial is by what is contrary."[255] Traditionally, the crucifixion was the central event in Christian history, but for Milton the great moment was Christ's rejection in the desert of Satan's temptations.[256] It follows that "all opinions, yea errors, known, read, and collated, are of main service and assistance toward the speedy attainment of what is truest."[257]

The truth does not need state assistance to prevail:

> And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter.[258]

The state, moreover, is likely to err in deciding what ideas to restrict: "[I]f it come to prohibiting, there is not aught more likely to be prohibited than truth itself; whose first appearance to our eyes bleared and dimmed with prejudice and custom, is more unsightly and unplausible than many errors . . . ."[259] Although coercion can prevent errors, it cannot produce

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[254] JOHN MILTON, *Areopagitica*, *in* COMPLETE POEMS AND MAJOR PROSE 716, 739 (Merritt Y. Hughes ed., 1957) (1644) [hereinafter MILTON, *Areopagitica*] (footnotes omitted).

[255] *Id.* at 728.

[256] The rejection of Satan's temptations is the subject of JOHN MILTON, *Paradise Regained*, *in* COMPLETE POEMS AND MAJOR PROSE, *supra* note 254, at 470 (1671).

[257] MILTON, *Areopagitica*, *supra* note 254, at 727. *Paradise Lost* likewise emphasizes the importance of a free choice between good and evil. JOHN MILTON, *Paradise Lost*, *in* COMPLETE POEMS AND MAJOR PROSE, *supra* note 254, at 207, 260 (1674) [hereinafter MILTON, *Paradise Lost*]. The speaker is God the Father, explaining why it was right to allow the rebel angels and, later, Adam to transgress:

> Freely they stood who stood, and fell who fell.
> Not free, what proof could they have giv'n sincere
> Of true allegiance, constant Faith or Love,
> Where only what they needs must do, appear'd,
> Not what they would? what praise could they receive?
> What pleasure I from such obedience paid,
> When Will and Reason (Reason also is choice)
> Useless and vain, of freedom both despoil'd,
> Made passive both, had serv'd necessity,
> Not mee.

Id. bk. III, ll. 102–11, at 260.

[258] MILTON, *Areopagitica*, *supra* note 254, at 746 (footnote omitted).

[259] *Id.* at 748. Censors are also likely to be incompetent because no intelligent person will want their jobs. *Id.* at 734–35. A few years later, Milton assumed the responsibility of a licenser himself, but he evidently dispensed licenses liberally, at one point citing his argument in *Areopagitica*, and as a result he was relieved of these duties. *See* GORDON CAMPBELL & THOMAS CORNS, JOHN MILTON: LIFE,

virtue, and "God sure esteems the growth and completing of one virtuous person more than the restraint of ten vicious."[260] Orthodoxy in doctrine is not important. What matters is not outward conformity, but adherence to the inner light. Coercion can only produce "the forced and outward union of cold and neutral and inwardly divided minds."[261] On the other hand, the pluralism that toleration would produce is not a bad thing; "those neighboring differences, or rather indifferences . . . whether in some point of doctrine or of discipline . . . though they may be many, yet need not interrupt 'the unity of spirit,' if we could but find among us the 'bond of peace.'"[262]

In an England in which speech is unrestricted, "there of necessity will be much arguing, much writing, many opinions; for opinion in good men is but knowledge in the making."[263] But all this division is superficial, concealing "one general and brotherly search after truth."[264] Truth is not a static thing that can be possessed once and for all. "Truth is compared in scripture to a streaming fountain; if her waters flow not in a perpetual progression, they sicken into a muddy pool of conformity and tradition."[265] Even religious division is a religious good. "[T]here must be many schisms and many dissections made in the quarry and in the timber, ere the house of God can be built."[266] This united effort will bring about historical progress, the completion of the great Protestant revolution: "[T]here be pens and heads there, sitting by their studious lamps, musing, searching, revolving

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WORK, AND THOUGHT 247–48 (2008); BLAIR WORDEN, LITERATURE AND POLITICS IN CROMWELLIAN ENGLAND: JOHN MILTON, ANDREW MARVELL, MARCHAMONT NEDHAM 242–43 (2007).

[260] MILTON, *Areopagitica*, *supra* note 254, at 733.

[261] *Id.* at 742.

[262] *Id.* at 747–48; *see also* MILTON, *Paradise Lost*, *supra* note 257, bk. III, ll. 183–97, at 262–63, where the "sincere intent" of prayer is a lot more important than its content:

> Some I have chosen of peculiar grace
> Elect above the rest; so is my will:
> The rest shall hear me call, and oft be warn'd
> Thir sinful state, and to appease betimes
> Th' incensed Deity while offer'd grace
> Invites; for I will clear thir senses dark,
> What may suffice, and soft'n stony hearts
> To pray, repent, and bring obedience due.
> To Prayer, repentance, and obedience due,
> Though but endeavor'd with sincere intent,
> Mine ear shall not be slow, mine eye not shut.
> And I will place within them as a guide
> My Umpire *Conscience*, whom if they will hear,
> Light after light well us'd they shall attain,
> And to the end persisting, safe arrive.

[263] MILTON, *Areopagitica*, *supra* note 254, at 743.

[264] *Id.* at 744.

[265] *Id.* at 739 (footnote omitted).

[266] *Id.* at 744 (footnote omitted).

new notions and ideas wherewith to present, as with their homage and their fealty, the approaching reformation . . . ."[267]

Individual dignity, a major theme in modern free speech constructivism, plays a limited role in Milton's argument. For an author to be compelled to bring his work "to the hasty view of an unleisured licenser, perhaps much his younger, perhaps far his inferior in judgment, perhaps one who never knew the labor of book-writing," and to then "appear in print like a puny with his guardian . . . cannot be but a dishonor and derogation to the author, to the book, to the privilege and dignity of learning."[268] But this is a decidedly secondary theme, and it is closely linked to a claim about state incompetence.

The argument as a whole depends not just on Protestantism, but on Milton's peculiarly latitudinarian Protestantism. Christopher Hill observes that Milton's theology rests on a radical Arminianism, in which salvation is available to all men who believe and is in no way dependent on the formal ceremonies of Catholicism or of the Anglican Church.[269] In sacraments as Milton understands them, "it is the attitude of the recipient that matters, not the ceremony."[270] This radical individualism is connected with a range of heretical religious views, many of them idiosyncratic to Milton.[271] Prominent among these idiosyncratic beliefs is the priesthood of all believers: anyone with a gift for making the Word of God known should be free to disseminate it.[272] Milton's defense of free speech depends crucially on these religious views.[273] If you do not share those views, he will not move you.

Milton does not propose to abolish all viewpoint-based restrictions on publication. His free speech theory contains no epistemological humility or veil of ignorance. "I mean not tolerated popery and open superstition, which, as it extirpates all religions and civil supremacies, so itself should be extirpate . . . that also which is impious or evil absolutely, either against faith or manners, no law can possibly permit, that intends not to unlaw itself . . . ."[274] But it is not clear why he draws the line here. Was Milton convinced that there was a Catholic conspiracy to enslave England?[275] Did he think that the Catholics, because they did not themselves believe in (and

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[267] *Id.* at 743 (footnote omitted).

[268] *Id.* at 735 (footnote omitted).

[269] CHRISTOPHER HILL, MILTON AND THE ENGLISH REVOLUTION 268–78 (1977).

[270] *Id.* at 306.

[271] *See generally id.* at 233–337. Milton's religious views rested on an equally idiosyncratic reading of Biblical authority. *See* Regina M. Schwartz, *Milton on the Bible*, *in* A COMPANION TO MILTON 37 (Thomas N. Corns ed., 2001).

[272] *See* WILLIAM HALLER, LIBERTY AND REFORMATION IN THE PURITAN REVOLUTION 56–64 (1955).

[273] *See generally* Blasi, *supra* note 252.

[274] MILTON, *Areopagitica*, *supra* note 254, at 747 (footnote omitted).

[275] *See* HILL, *supra* note 269, at 155–58.

indeed aimed to subvert) toleration, were therefore not entitled to it?[276] Did he think that Catholic speech was not about a matter reasonably in doubt and so could not contribute to the advancement of truth?[277] Was tolerance only for the "neighboring differences" of those committed to Protestantism?[278] Did Milton simply betray his own principles?[279] It is impossible to know. Because the aim is to create a certain kind of society, and because speech is instrumental to that end, there is no way to deduce the limits of toleration from first principles. The kind of free speech theory that focuses first on the boundaries of protection is not Milton's concern. If he can convince his audience, the members of Parliament, to share his social vision, then the boundaries of protection can be left to their discretion.

C. Mill

Mill's argument in his 1859 book *On Liberty* contains all of the elements just described in Milton, standing in a similar relationship to one another. However, the foundation is different: the Christian idea of salvation through faith has been replaced by a Romantic ideal of authenticity. But the moves are recognizably Milton's.[280] Most importantly, they are equally teleological. Mill does not reason from first principles. He, like Milton, has a vision of individual perfection within a good society and proposes rules calculated to realize that vision.

The liberty that Mill defends encompasses "liberty of expressing and publishing opinions," but also "liberty of tastes and pursuits, of framing the plan of our life to suit our own character, of doing as we like, subject to such consequences as may follow, without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong."[281] The protection of speech is an exception to his principle that the state may interfere with

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[276] Analogous arguments were made in the mid-twentieth century to justify withholding free speech protection from Communists. *See* Carl A. Auerbach, *The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech*, 23 U. CHI. L. REV. 173, 186–89 (1956); Bork, *supra* note 44, at 31.

[277] Ernest Sirluck, *Introduction* to 2 THE COMPLETE PROSE WORKS OF JOHN MILTON 1 (Ernest Sirluck ed., 1959), *reprinted in* BLASI, *supra* note 94, at 124–26.

[278] Willmoore Kendall, *How to Read Milton's* Areopagitica, 22 J. POL. 439, 464 (1960).

[279] *See* THOMAS N. CORNS, JOHN MILTON: THE PROSE WORKS (1998), *reprinted in* BLASI, *supra* note 94, at 126–28.

[280] The parallels have also been noted by LANA CABLE, CARNAL RHETORIC: MILTON'S ICONOCLASM AND THE POETICS OF DESIRE 129–35 (1995); ALAN HAWORTH, FREE SPEECH 118–30 (1998); and STEWART JUSTMAN, THE HIDDEN TEXT OF MILL'S *LIBERTY* 75–110 (1991). In a remarkable coincidence, Mill once lived in a house formerly occupied by Milton. EUGENE AUGUST, JOHN STUART MILL: A MIND AT LARGE 17 (1975), *reprinted in* BLASI, *supra* note 94, at 312. Mill may be read as refurbishing Milton's argument, stripping it to the beams and rebuilding while relying on the same basic structure.

[281] MILL, *supra* note 111, at 71.

liberty only to prevent harm to others: almost all speech is protected even when it is harmful. But the exception is embedded within the same commitments that generate the broader protection of liberty.

The reason for this broad liberty is an ideal of individuality. God is absent from that ideal—here is the fundamental difference between Milton and Mill—but every individual still has an obligation to respond to an inwardly felt calling, which if courageously pursued will bring him closer to the ultimate good. Free speech and freedom of conduct are valuable because they smooth the path toward this good.[282]

Like Milton, Mill places enormous value upon the ability to face and overcome temptation. Society needs "open, fearless characters."[283] His argument that truth is likely to emerge from the collision of ideas is familiar, but much more than Milton he relies on the experience of the scientific revolution (though Milton does augment his case against censorship by recalling his visit with Galileo, then under house arrest in Italy).[284] Like Milton, Mill cares about the capacity to grasp truth inwardly, not just by outward show. He values "the clearer perception and livelier impression of truth produced by its collision with error."[285] If the reasons for even a true opinion are held without understanding the arguments both for and against it, "it will be held as a dead dogma, not a living truth."[286] As in Milton, a man may be a heretic even in the truth.[287] Truth held dogmatically "is but one superstition the more, accidentally clinging to the words which enunciate a truth."[288] The pursuit matters more than the attainment: "Truth gains more even by the errors of one who, with due study and preparation, thinks for himself than by the true opinions of those who only hold them because they do not suffer themselves to think."[289] Again like Milton, he uses a military metaphor[290] to describe the struggle he wishes to elicit: "Both teachers and learners go to sleep at their post as soon as there is no enemy in the field."[291]

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[282] *See* FRED R. BERGER, HAPPINESS, JUSTICE, AND FREEDOM: THE MORAL AND POLITICAL PHILOSOPHY OF JOHN STUART MILL 271–74 (1984).

[283] MILL, *supra* note 111, at 94.

[284] MILTON, *Areopagitica*, *supra* note 254, at 737–38.

[285] MILL, *supra* note 111, at 76; *see also id.* at 95.

[286] *Id.* at 97.

[287] As Justman observes, Mill uses this metaphor sympathetically in his earlier essay on Coleridge. JUSTMAN, *supra* note 280, at 92.

[288] MILL, *supra* note 111, at 97.

[289] *Id.* at 95.

[290] Peters observes that for Mill, truth's triumph is less inevitable, more a matter of probability. "If Milton took truth as an undefeated wrestler, never vanquished in a match against falsehood, Mill's sporting metaphor might be a batting average." PETERS, *supra* note 102, at 129.

[291] MILL, *supra* note 111, at 105. Like Milton, he thinks that the moral distress of contemplating ways of life antithetical to your own is good for you. *See* JEREMY WALDRON, *Mill and the Value of Moral Distress*, *in* LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991, at 115 (1993). This is his answer

Independence of character is valuable in itself:

> It is not by wearing down into uniformity all that is individual in themselves, but by cultivating it and calling it forth, within the limits imposed by the rights and interests of others, that human beings become a noble and beautiful object of contemplation; and as the works partake the character of those who do them, by the same process human life also becomes rich, diversified, and animating, furnishing more abundant aliment to high thoughts and elevating feelings, and strengthening the tie which binds every individual to the race, by making the race infinitely better worth belonging to.[292]

As John Durham Peters observes, Mill's ideal of character is an unstable mix of Stoicism and romanticism. As listeners, citizens must be willing to subject their dearest beliefs to challenge and criticism, and learn to articulate views the opposite of their own. Yet as speakers, they must present their ideas powerfully and with conviction.[293]

The valuable traits of character promoted by a regime of free speech have a negative counterpart in the malign effects of censorship. "The greatest harm done is to those who are not heretics, and whose whole mental development is cramped and their reason cowed by the fear of heresy."[294] The consequence is "a low, abject, servile type of character,"[295] and Mill bombards it with nasty metaphors: automatons in human form, apes, cattle, sheep. He even borrows Milton's metaphor of a "stagnant pool."[296] Alan Ryan observes that *On Liberty* "does not so much lay out logically compelling arguments as depict a type of character to which one can react favourably or unfavourably."[297]

As in Milton, the truth is permanently elusive and will emerge over time as a consequence of the collision of opposing ideas in a regime of unfettered discourse. "The exclusive pretension made by a part of the truth

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to Justman's objection: "[I]f people know best what makes them happy, then Mill has no warrant to criticize Victorians for their conformism, their meanness of soul—perhaps that's what makes them happy." JUSTMAN, *supra* note 280, at 100. Mill is not a neutralist liberal: he thinks that "the most important point of excellence which any form of government can possess is to promote the virtue and intelligence of the people themselves." JOHN STUART MILL, *Considerations on Representative Government* (1861), *in* 19 COLLECTED WORKS: ESSAY ON POLITICS AND SOCIETY 371, 390 (J.M. Robson ed., 1977).

[292] MILL, *supra* note 111, at 127. The same theme is apparent in his essay *The Subjection of Women*, which condemns "the dull and hopeless life to which [society] so often condemns them, by forbidding them to exercise the practical abilities which many of them are conscious of, in any wider field than one [childrearing] which to some of them never was, and to others is no longer, open." JOHN STUART MILL, *The Subjection of Women* (1869), *reprinted in* ON LIBERTY AND OTHER ESSAYS 469, 580 (John Gray ed., 1991).

[293] PETERS, *supra* note 102, at 130–36.

[294] MILL, *supra* note 111, at 95.

[295] *Id.* at 114.

[296] *Id.* at 129.

[297] ALAN RYAN, J.S. MILL 141 (1974).

to be the whole must and ought to be protested against . . . ."[298] Progress is nonetheless possible: "As mankind improve, the number of doctrines which are no longer disputed or doubted will be constantly on the increase; and the well-being of mankind may almost be measured by the number and gravity of the truths which have reached the point of being uncontested."[299]

Like Milton, Mill also stresses the likely incompetence of state authorities. Censorship of opinion presumes an infallibility to which the state is not entitled. Even when it interferes with conduct rather than speech, "the odds are that it interferes wrongly and in the wrong place."[300]

Liberty of conduct, treated in a different section of *On Liberty* than freedom of speech, rests on the same foundation. Liberty of conduct is good for one's character; it also has collective benefits because it makes important information available to mankind. Mill's call for "experiments of living"[301] is not merely a metaphor; it is offered in a scientific spirit. Mill thinks it possible to make progress with respect to values as well as facts: mankind can discover higher pleasures that, once known, will be preferred to the lower ones.[302] "[T]he only unfailing and permanent source of improvement is liberty, since by it there are as many possible independent centres of improvement as there are individuals."[303] Developed human beings are of use to the undeveloped primarily because "they might possibly learn something from them."[304] Even action that brings "great harm to the agent himself" is beneficial to others because, "if it displays the misconduct, it displays also the painful or degrading consequences which, if the conduct is justly censured, must be supposed to be in all or most cases attendant on it."[305] This is why "[m]ankind are greater gainers by suffering each other to live as seems good to themselves than by compelling each to live as seems good to the rest."[306]

Finally, also like Milton, Mill's account of the limits of the tolerable does not purport to be deductive. Opinions lose immunity

> when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled

[298] MILL, *supra* note 111, at 114.
[299] *Id.* at 106.
[300] *Id.* at 151.
[301] *Id.* at 120.
[302] *See* BERGER, *supra* note 282, at 30–63.
[303] MILL, *supra* note 111, at 136.
[304] *Id.* at 129.
[305] *Id.* at 150–51.
[306] *Id.* at 72.

> before the house of a corn dealer, or when handed about among the same mob in the form of a placard.[307]

How is a court to tell what constitutes a "positive instigation"? The fact that bad conduct is a probable result of the speech? (The Supreme Court adopted that test for a while, with lamentable results.)[308] Or something more speech protective, such as clear and present danger, advocacy of actual law violation, or something like the *Brandenburg* test? Mill does not say. He is as vague as Milton about the boundary. It is not his central concern. Like Milton, he tries to create a kind of society and to coax the reader to see its appeal. The creation of appropriate rules of law is ancillary to his project.

D. Milton and Mill Compared

There are major structural similarities between the arguments of Milton and Mill. An ideal of individual perfection, consisting of personal, inwardly felt connection with a source of value that is not reducible to any formula or received set of behaviors, lies at the core of both theories. The good toward which the individual strives is dynamic and ever changing, demanding a corresponding dynamism from the individual. Individual virtue, then, consists of the ability and the courage to weigh alternatives. One facet of this virtue is the capacity to discern truth, a truth that one can only progress toward in an asymptotic process that never ends. The collision of ideas helps the individual in this task by forcing him to confront his real range of choices.

Both also have a vision of communal life driven by the need to facilitate the realization of this individual ideal. Society's task is to foster conditions of experimentation and debate that make it likely that the individual will engage in the necessary moral confrontation. Even errors are valuable, and their dissemination should be tolerated because they help to promote such confrontation. Individual struggles produce benefits for society, both in the advancement of truth and the discovery of new and better ways of living. The social unity both Milton and Mill envision depends on a general understanding of the way in which liberty promotes self-development, the core ideal for both theorists.

Their ideals of self-development are culturally specific, though neither Milton nor Mill would likely have seen this. Milton's ideal depends on his radical Protestantism. Mill's relies on his peculiar combination of romanticism and stoicism. Neither embraces anything so abstract as truth,

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[307] *Id.* at 119. But see a somewhat different articulation of the limit at *id.* at 76 n.*, where he says that incitement to violence may be punished "only if an overt act has followed, and at least a probable connection can be established between the act and the instigation." Mill does not appear to notice the large differences between these two formulations.

[308] *See* REDISH, FREEDOM OF EXPRESSION, *supra* note 110, at 175–83.

democracy, or self-realization, but both have specific ideas of how freedom ought to be exercised.

Alan Haworth, who has also noted the similarities between *Areopagitica* and *On Liberty*, thinks that the very different context in which Mill writes weakens his reformulation of Milton's argument. "Milton gains sharpness by keeping his target restricted"[309]: he argues against licensing, not against all silencing of discussion. When Milton argues that speech advances truth, he only considers moral truth, the knowledge of right and wrong. He is right that licensers have no legitimate claim to superior understanding about that. However, Mill tries to generalize the point into areas of discourse where it is less clearly correct. Milton's argument against taking ideas on trust also makes more sense in the context of Protestant religion than it does with respect to the rest of human knowledge where such trust is indispensable in ordinary life.

Haworth's objections do not undermine Mill so much as make his claims more diffuse. Mill's power comes from his distinctive ideal of the human person, not from any particular argument.[310] As with Madison, when Milton's arguments are displaced from their original context, they lose some of their logical power but continue to articulate a set of commitments about which speech should be tolerated.

Milton and Mill both offer attractive responses to certain inescapable tendencies of modernity. That is the source of their enduring appeal. In modern societies, individuals typically live in a plurality of lifeworlds, in which family life, work life, and political life involve vastly different, often discrepant meanings and experiences. Ideologies of pluralism legitimate this experience.[311] Given the extent to which the individual must continually refashion his social identity, the right to freely plan and shape one's own life becomes salient because it is rooted in the fundamental structures of modern society.[312]

Milton and Mill are both important and influential theorists of free speech, but you will doubtless have noticed that both are English. How have Americans thought about free speech?

E. The American Tradition

From the beginning, there were two American approaches to free speech: an orthodox legal view that construed the liberty narrowly as merely freedom from prior restraints, and a popular free speech tradition that was far more speech protective. The popular tradition is invisible in the

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[309] HAWORTH, *supra* note 280, at 123.

[310] *See* ISAIAH BERLIN, *John Stuart Mill and the Ends of Life*, *in* FOUR ESSAYS ON LIBERTY 173 (1969).

[311] *See* PETER L. BERGER, BRIGITTE BERGER & HANSFRIED KELLNER, THE HOMELESS MIND: MODERNIZATION AND CONSCIOUSNESS 68 (1973).

[312] *See id.* at 79.

cases: "To the extent that a popular free speech tradition helped to prevent repressive legislation, it left no court decisions or statutes."[313] But it was an important part of American discourse. It went beyond prior restraints and repudiated the idea that speech could be suppressed whenever it encouraged bad conduct. It was not a well-developed account of the boundaries of protected speech, but it did provide the principal reason why free speech was a well-established practice.[314] The antebellum South, where antislavery speech was increasingly repressed, remained an exception to the popular tradition. Precisely because popular culture valued free speech, the North denounced this repression.

This pattern—popular support for free speech, combined with repressive courts—continued until the mid-twentieth century. By the late 1800s, free speech had become an important element of libertarian radicalism and the first scholarly defenses of free speech appeared.[315] These writers remained marginal, having no influence on the courts and little on the larger culture. The popular tradition occasionally led state actors to adopt rules much like the ones we have today, but those rules were neither embedded in any larger theory nor judicially enforced to invalidate legislation.[316]

The absence of a theory can be regarded as a problem. Zechariah Chafee complained that in the nineteenth century free speech was not given any specific legal content.[317] Alexander Bickel responded that it is better that legal doctrine never be forged in the first place because "law can never make us as secure as we are when we do not need it. Those freedoms which are neither challenged nor defined are the most secure."[318]

One can see fragments of the Milton–Mill ideal in the epigrammatic, highly influential early twentieth-century formulations of Justices Holmes and Brandeis, the wellspring of modern judicial protection of speech. When Holmes invokes "the competition of the market"[319] as a test for truth, he

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313 CURTIS, *supra* note 89, at 15.

314 Nor did it rely entirely on Madisonian premises; it also tended to invoke a character ideal. A prominent example is the series of English pamphlets entitled *Cato's Letters*, by John Trenchard and Thomas Gordon, which were ubiquitously reprinted and quoted in the colonies. *See* LEVY, *supra* note 87, at 113–14. Cato was concerned about political oppression, but also argued that, in regimes without free speech, "[t]he minds of men, terrified by unjust power, degenerated into all the vileness and methods of servitude: Abject sycophancy and blind submission grew the only means of preferment, and indeed of safety; men durst not open their mouths, but to flatter." *No. 15: Of Freedom of Speech: That the Same Is Inseparable from Publick Liberty* (Feb. 4, 1720), *in* 1 JOHN TRENCHARD & THOMAS GORDON, CATO'S LETTERS OR ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS 110, 115 (Ronald Hamowy ed., 1995).

315 *See* RABBAN, *supra* note 86, at 177–210.

316 *See generally id.*

317 ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES 506–09 (1941).

318 ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 60 (1975).

319 Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

invokes both the scientific revolution rationale and, implicitly, the idea of a dynamic, agonistic society, heavily inflected by the influence of the pragmatists and Darwin.[320] A distinctive character ideal and the fear of a blindly repressive society animate Brandeis's claims that "courage" is "the secret of liberty" and his claim, dense with images and metaphors, that

> it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.[321]

Both Holmes and Brandeis are too brief and conclusory to be constructivist, and the specific legal tests they proposed have been discarded. But their statements of free speech ideals have endured.

Alexander Meiklejohn may seem to offer a more constructivist approach, declaring that freedom of speech is "a deduction from the basic American agreement that public issues shall be decided by universal suffrage."[322] As his critics have noted, however, Meiklejohn's pretensions to deduction are a sham. His work is full of undefended assumptions about the appropriate scope of the political agenda and the nature of political freedom, and the boundary he draws between protected and unprotected speech is notoriously conclusory and indeterminate.[323] No court could administer it as a rule, even if it wanted to. What he really offers is a bold—in context, heroic—rhetorical intervention in a repressive political environment, masquerading as a deductive argument.[324] His main achievement lies in stating reasons why speech that advocates the overthrow of the government, the speech of Communists, has political value and should be protected. In the United States, the power to suppress such speech was used throughout Meiklejohn's career to repress legitimate dissent, almost always from the political left, and thereby to deprive the electorate of legitimate political choices.[325] Meiklejohn fought the good fight, but he was not a constructivist.

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[320] *See* LOUIS MENAND, THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA (2001); Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1.

[321] Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). The importance of this character ideal for Brandeis is elaborated in Vincent Blasi, *Free Speech and Good Character: From Milton to Brandeis to the Present*, *in* ETERNALLY VIGILANT, *supra* note 168, at 61 [hereinafter Blasi, *Free Speech and Good Character*], and Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in* Whitney v. California, 29 WM. & MARY L. REV. 653 (1988).

[322] ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1960).

[323] *See* LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA 147–58 (1986); POST, *supra* note 109, at 268–89; Redish & Mollen, *supra* note 109, at 1312–21; Wellington, *supra* note 100, at 1110–12, 1116–17.

[324] *See* BOLLINGER, *supra* note 323, at 152–58.

[325] *See* REDISH, LOGIC OF PERSECUTION, *supra* note 152, *passim*.

F. Emerson

The title of Thomas Emerson's *Toward a General Theory of the First Amendment*,[326] which is one of the most cited law review articles on free speech,[327] is often taken to aim at a constructivist theory.[328] However, the article actually offers a set of general value commitments, relevant to but not dispositive of a broad range of free speech problems, together with a description of the environment in which those values are to be realized. His aim, he says, is to analyze

> (I) what it is that the first amendment attempts to maintain: the function of freedom of expression in a democratic society; (II) what the practical difficulties are in maintaining such a system: the dynamic forces at work in any governmental attempt to restrict or regulate expression; and (III) the role of law and legal institutions in developing and supporting freedom of expression.[329]

He articulates multiple speech values without assigning priority to any one of them. Speech is valuable for individual self-fulfillment, to advance the discovery of truth, to provide for participation in decisionmaking, and to achieve a more adaptable community. No deeper foundations are stated. The theory of freedom of expression "comprehends a vision of society, a faith and a whole way of life."[330]

Emerson then anatomizes, at some length, "the powerful forces that impel men toward the elimination of unorthodox expression."[331] He undertakes a rich sociological and institutional description of contemporary America, which he takes to be the indispensable predicate of the protections he advocates. Those forces are illustrated by the history of speech suppression in America, notably the period of the Alien and Sedition laws, the restrictions of World War I, and the restrictions that

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[326] Emerson, *supra* note 224.

[327] In 1985, it was number twenty-six among the top fifty articles ever written. Fred R. Shapiro, *The Most-Cited Law Review Articles*, 73 CALIF. L. REV. 1540, 1550 (1985). The only other article that had free speech as its central focus was Bork, *supra* note 44, (tied for number twenty-four) which very slightly outranked it with four more citations. By 1996, Bork had risen to number seven and Emerson had declined to thirty-three. Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 768 (1996).

[328] Thus, for example, Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212 (1983), makes clear that Emerson is one of his targets. *See id.* at 1283. By "theory," however, Shiffrin means constructivism: "high level abstractions that dictate results in all or most concrete cases." *Id.* at 1254. It is anachronistic to attribute this kind of theory to Emerson, but Shiffrin's assumption that this must be what Emerson was trying to do is revealing because it shows how pervasive the assumption had become by 1983 that any free speech theory must be constructivist.

[329] Emerson, *supra* note 224, at 878.

[330] *Id.* at 886; *see also* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 7–8 (1970).

[331] Emerson, *supra* note 224, at 887.

followed World War II.[332] It is because those forces are so powerful that there must be a strong commitment to the right to free expression, and any exceptions to protection "must be clear-cut, precise and readily controlled."[333]

Emerson thus argues for rigid speech-protective rules, not because they are logical deductions from his premises, but because recent memory shows that the existing law of free speech is too weak to afford the protection that is necessary if the goods of a free society are to be realized. The rules he proposes are crafted with that experience in mind. The four purposes of free speech that he lays out are not premises from which he deduces anything. They are values that the reader should keep in mind when evaluating his proposals. His proposals are cobbled together instrumentally, in a spirit of problem solving rather than logical inference. Judges are authorized to implement these proposals merely because their exercise of discretion is more trustworthy than that of the legislative and executive branches of government.[334] In this there is a huge gap between Emerson and the later writers who seize one of the values he lays out and make it the major premise of a constructivist theory.

The analogy to the practice of medicine illuminates why Emerson organizes his article as he does. Before you can be a doctor, you need to (1) understand what constitutes health, (2) have a detailed factual description of the situation that presents obstacles to its attainment, and from these (3) devise a provisional plan for treatment, revisable in light of experience. Emerson offers (1) a statement of free speech ideals, (2) a description of the environment in which free speech is endangered, and (3) proposed rules to address the dangers. No wonder constructivists were impatient with Emerson.

Emerson leaves some important matters vague. The doctrinal structure he proposes is crude. Schauer observes that "if a number of diverse values are served by the First Amendment, it would seem more likely that an equally diverse doctrinal structure would result."[335] Emerson gives no explanation for the diminished protection of commercial speech.[336] He makes protection of all kinds of speech dependent upon a potentially misleading distinction between "expression" and "action," the labels suggesting that protection turns on something intrinsic in the "essential qualities"[337] of the communication that puts it on one or the other side of

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[332] *See id.* at 891–93.

[333] *Id.* at 889.

[334] *See id.* at 896–99, 903–07. On the limited validity of this claim, see *supra* note 224.

[335] Schauer, *Codifying the First Amendment*, *supra* note 135, at 313.

[336] *See* Redish, *Commercial Speech*, *supra* note 113, at 97.

[337] Emerson, *supra* note 224, at 917. Any search for such "essential qualities" is delusory because there are no such essential qualities. Stanley Fish correctly observes that "insofar as the point of the First Amendment is to identify speech separable from conduct and from the consequences that come in

the line. But the distinction as he implements it turns on a purely consequentialist judgment, "a question of whether the harm attributable to the conduct is immediate and instantaneous, and whether it is irremediable except by punishing and thereby preventing the conduct."[338] On this basis, for example, he concludes that defamation of private figures,[339] undesired publicity,[340] and perhaps even publication of information that might prejudice a fair trial[341] is "action."[342] Emerson does not consider the limits of First Amendment salience at all: he has nothing to say about the exclusion of, for example, contract law, which consists almost entirely of visiting unwanted consequences on persons because of words that they have said.[343] Certain kinds of speech are particularly salient for Emerson, evidently, because those kinds of speech are necessary to achieve the ends that he valorizes. We have discovered distinctive goods of discourse that make sense in our time and place. We need rules that will preserve this sphere of discourse. The weakness of Emerson's theory is that his tools were too crude for the job as he himself conceived it. In short, Emerson "attempts to put too much of a diverse phenomenon into too sparse a doctrinal structure."[344]

As late as the mid-1960s, there was no constructivist theory of free speech. Consider two other leading writers.[345] Harry Kalven's *The Negro*

conduct's wake, there is no such speech and therefore nothing for the First Amendment to protect." FISH, *supra* note 228, at 106. For further analysis of the incoherence of the distinction, see REDISH, FREEDOM OF EXPRESSION, *supra* note 110, at 201–04; LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 825–32 (2d ed. 1988); Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277 (2005).

[338] Emerson, *supra* note 224, at 917.

[339] *Id.* at 922.

[340] *Id.* at 927.

[341] *Id.* at 925.

[342] In his later discussion in *The System of Freedom of Expression*, Emerson again describes the issue as presenting the (incoherent) question: "which element is predominant in the conduct under consideration. Is expression the major element and the action only secondary? Or is the action the essence and the expression incidental?" EMERSON, *supra* note 330, at 80. In the discussion that follows, however, he focuses instead, much more sensibly, on an entirely distinct issue: whether the government's purpose in restricting any particular conduct is to curtail expression. *See id.* at 80–90. The Court itself has taken a similar line, holding that restrictions on communicative conduct are permissible "if the governmental interest is unrelated to the suppression of free expression." United States v. O'Brien, 391 U.S. 367, 377 (1968). Emerson denounces the *O'Brien* test, but his real concern is that the Court misapplied it in that case: "it is apparent that governmental control was directed at prohibiting the expression in draft card burning, not at punishing the action." EMERSON, *supra* note 330, at 84.

[343] *See* Schauer, *supra* note 211.

[344] Schauer, *supra* note 106, at 410.

[345] Another prominent work is Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962), which argues strongly against ad hoc balancing in favor of rules. He says little about how the rules are to be derived, except to endorse the argument of Meiklejohn. *See id.* at 1449 n.105. If Meiklejohn is no constructivist, see *supra* text accompanying notes 322–25, then neither is Frantz. Thanks to Steven Shiffrin for calling my attention to this article.

and the First Amendment[346] contains only close critical readings of cases, with no overarching theoretical framework.[347] Alexander Bickel's treatment of speech issues in *The Least Dangerous Branch* is similarly case specific.[348] In his last work, perhaps reacting to the early emergence of free speech constructivism, he flatly repudiates the idea that the First Amendment is a "coherent theory that points our way to unambiguous decisions."[349]

V. INSTITUTIONS AND CHARACTER IN THE SYSTEM OF FREEDOM OF EXPRESSION

Milton, Mill, Holmes, Brandeis, Emerson, and Post all articulate the imperatives of the emerging category of public discourse. All are, in different ways, consequentialist, describing the good results that discourse will produce. The label "consequentialist" may, however, obscure the fact that no consequence is self-evaluating: all these writers work in a cultural milieu in which those results *count* as good. All are ideologists of an emerging practice.[350] All would agree with Owen Fiss that freedom of speech refers to "a social state of affairs, not the action of an individual or institution."[351]

The elements of a healthy realm of public discourse are multiple and mutually reinforcing. Much recent scholarship has identified values of free speech in addition to those enumerated by Emerson.[352] These works have often been criticized as inadequate or partial accounts of the purpose of free speech, but they are better understood as descriptions of single elements of the cluster. Schauer's hypothesis, that we have several different First Amendments, has already been noted. This Part considers how they fit together.

The sphere of public discourse has many interlocking elements in addition to speech-protective rules of law. I here consider them in two

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346 HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT (1965).

347 The contingencies and doctrinal embarrassments of *New York Times v. Sullivan* are discussed, with no attempt or even inclination to clean them up with an elegant theory, in *id.* at 52–64; see also Harry Kalven, Jr., *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191. For a shrewd assessment of Kalven's ambivalence toward grand theory, see Schauer, *supra* note 106.

348 ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 51–55, 88–100, 149–50, 232–34 (1986).

349 BICKEL, *supra* note 318, at 57.

350 Here I use the term "practice" in MacIntyre's sense. *See supra* note 237. MacIntyre, though not a friend of liberalism, has recognized a distinct set of communal goods promoted by the toleration of conflicting points of view. ALASDAIR MACINTYRE, *Toleration and the Goods of Conflict*, *in* 2 ETHICS AND POLITICS: SELECTED ESSAYS 205 (2006).

351 OWEN M. FISS, *Free Speech and Social Structure*, *in* LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER 7, 15 (1996).

352 *See supra* text accompanying note 330.

broad categories: the institutional framework and the character of individuals.

With respect to the institutional element, Jürgen Habermas's historical analysis of the emergence of the public sphere is helpful. In Europe, beginning late in the seventeenth century, a new set of institutions developed—newspapers, literary salons, coffeehouses, novels, and works of art criticism—separate from both the state and private civil society. These institutions generated a new sphere of public reason that became the basis for criticizing both. Printedness took on a new cultural meaning, implying a new mode of societal integration resting on the common use of reason, through discourse addressed to a broad and impersonal audience.[353]

Habermas's later work is less historical and more abstract, elaborating on the norms he thinks implicit in the practice of discourse. For example, he claims that when people engage in communicative action, they "must commit themselves to pragmatic presuppositions of a counterfactual sort," notably "that the participants pursue their illocutionary goals without reservations, that they tie their agreement to the intersubjective recognition of criticizable validity claims, and that they are ready to take on the obligations resulting from consensus and relevant for further interaction."[354] From these abstract premises, Lawrence Solum deduces a doctrine of free speech that privileges speech aimed at the consensual coordination of action, as opposed to speech that merely attempts to manipulate its audience.[355]

The Habermas–Solum approach begins to look like another constructivism. Habermas's theory aims to reconstruct actual practice, and Solum aims to similarly reconstruct free speech doctrine. But the abstraction of Habermas's later theory obscures the historical specificity of any particular public sphere. Habermas's public sphere is an ideal type subject to a broad range of possible elaborations.[356] Habermas's early work excessively idealized the discourse of the eighteenth century and overstated the novelty of modern pathologies.[357]

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[353] *See* HABERMAS, *supra* note 140.

[354] JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 4 (1996). For elaboration, see JÜRGEN HABERMAS, *Discourse Ethics: Notes on a Program of Philosophical Justification*, *in* MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 43–115 (Christian Lenhardt & Shierry Weber Nicholsen trans., 1990).

[355] Lawrence Byard Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54, 96–97, 111–13 (1989).

[356] Peters observes that its ideal–typical character is exaggerated by the neologism "public sphere" in the translation of Habermas's book, which aims to explain the origins of what in German was an ordinary and familiar political term. John Durham Peters, *Distrust of Representation: Habermas on the Public Sphere*, 15 MEDIA, CULTURE & SOCIETY 541, 543–44 (1993).

[357] See the critical essays and Habermas's response in HABERMAS AND THE PUBLIC SPHERE (Craig Calhoun ed., 1992). Craig Calhoun also observes that Habermas almost completely neglects the internal

The community of participants, for example, may be more exclusive than Habermas hopes. He optimistically assumes that it includes everyone in the polity, but Michael Warner has shown how the audience for books and newspapers in early America was primarily white, male, and upper class. Indeed, printing was one of the markers that constituted a specifically white community.[358] A lively debate took place among Southern white Americans in the late nineteenth century over the proposal to disenfranchise black citizens. The proposal was adopted.[359]

The norms of the community, defined in this exclusionary way, can place limits on permissible viewpoints. The democratic imperative to bond citizens together so that the losers in majority voting nonetheless retain allegiance to the polity can create "an all-but-irresistible pull to build the common identity around the things that strongly unite people, and these are frequently ethnic or religious identities."[360] In the limiting case, "the logic of democracy can become that of ethnic cleansing."[361] Or milder incursions on rights: Community ideals may underwrite speech limitations, such as bans on blasphemy and pornography.[362]

Another key parameter is how media shapes the public discourse.[363] An inchoate public realm exists whenever speech is composed for an audience of strangers: it is implicitly present in Homer. Different media imply different audiences. Contrast cheap paperback editions with expensive hardcovers.[364] The Internet implies a still different public.

Shifts in the medium of public discourse can have both positive and negative effects for the multiple values of free speech. The Internet, for example, makes it far cheaper to disseminate information, but also guts revenue sources for newspapers and has decimated their newsgathering staffs.[365] Vincent Blasi long ago noted the "need for well-organized, well-financed, professional critics to serve as a counterforce to government—

organization of the public sphere: "the power relations, the networks of communication, the topography of issues, and the structure of influence." Craig Calhoun, *Introduction* to *id.* at 1, 38.

[358] *See* MICHAEL WARNER, THE LETTERS OF THE REPUBLIC: PUBLICATION AND THE PUBLIC SPHERE IN EIGHTEENTH-CENTURY AMERICA 12 (1990).

[359] *See* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 67–109 (3d rev. ed. 1974).

[360] Charles Taylor, *Modes of Secularism*, *in* SECULARISM AND ITS CRITICS 31, 46 (Rajeev Bhargava ed., 1998).

[361] *Id.* at 48.

[362] *See* POST, *supra* note 109, at 89–116.

[363] On the impact of media on thought, see also RICHARDS, *supra* note 110, at 167–68.

[364] That is why English censors often were willing to tolerate expensive but not cheap editions of erotically charged classics like Boccaccio and Balzac. *See* IAN HUNTER ET AL., ON PORNOGRAPHY: LITERATURE, SEXUALITY AND OBSCENITY LAW 75 (1993).

[365] *See* Eric Alterman, *Out of Print: The Death and Life of the American Newspaper*, NEW YORKER, Mar. 31, 2008, at 48.

critics capable of acquiring enough information to pass judgment on the actions of government."[366] Those critics are disappearing.

The state can shape public discourse by means that have nothing to do with the censorship that concerns First Amendment law. For example, Christianity spread quickly because the Roman Empire guaranteed that travelers could journey safely between cities. The press in the early American republic depended heavily on the federal policy of preferential mailing rates for newspapers.[367] The shape of public discourse would be very different without copyright law.

Finally, the values promoted by public discourse depend on ongoing institutional practices. The truth-promoting rationale for free speech, for example, rests on the paradigm of scientific inquiry; this rationale would be far less persuasive were there not an ongoing practice of such inquiry. Literature, too, exists in concrete institutional forms that presuppose an audience that shares, or can be made to share, aesthetic judgments. Free speech protects art only because, and to the extent that, judges perceive art as valuable. The bounds of perceived value shift over time. Constitutional protection of pornography might not exist had not writers such as Lawrence and Joyce undertaken to merge two genres, the educative and the erotic novel, which previously had coexisted in absolutely distinct channels of distribution.[368]

The Supreme Court occasionally (without admitting it) gives constitutional weight to the distinctive function of institutions, such as public television stations, the National Endowment for the Arts, the legal profession, universities, and media corporations.[369] There is reasonable controversy over whether doctrine would be better served by expressly incorporating these institutional categories. The healthy operation of this infrastructure of free speech should be taken into account at least at the architectonic level.

But the public sphere consists of more than institutions. The public sphere demands that the people have certain distinctive traits of character. Literacy is only the beginning. Citizens need to be predisposed to make the

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[366] Blasi, *supra* note 51, at 541.

[367] *See* RICHARD B. KIELBOWICZ, NEWS IN THE MAIL: THE PRESS, POST OFFICE, AND PUBLIC INFORMATION, 1700–1860s (1989); Anuj C. Desai, *The Transformation of Statutes into Constitutional Law: How Early Post Office Policy Shaped Modern First Amendment Doctrine*, 58 HASTINGS L.J. 671 (2007).

[368] *See* HUNTER ET AL., *supra* note 364, at 92–134.

[369] *See* Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273 (2008); Paul Horwitz, *Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment*, 76 TEMP. L. REV. 1 (2003); Frederick Schauer, *Institutions as Legal and Constitutional Categories*, 54 UCLA L. REV. 1747 (2007); Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84 (1998); Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005).

effort to hear and understand what is said.[370] The practice of free speech also includes a character ideal, which continues to have elements first articulated by Milton and Mill. Vincent Blasi has observed that free speech incorporates a complex set of virtues:

> inquisitiveness, independence of judgment, distrust of authority, willingness to take initiative, perseverance, courage to confront evil, aversion to simplistic accounts and solutions, capacity to act on one's convictions even in the face of doubt and criticism, self-awareness, imagination, intellectual and cultural empathy, resilience, temperamental receptivity to change, tendency to view problems and events in a broad perspective, and respect for evidence.[371]

One particularly valuable trait is the capacity to tolerate opposing views. By "carving out one area of social interaction for extraordinary self-restraint," Lee Bollinger observes, the free speech regime helps to "develop and demonstrate a social capacity to control feelings evoked by a host of social encounters."[372] The social benefits of a free speech regime include "the spirit of compromise basic to our politics and the capacity to distance ourselves from our beliefs."[373]

The free speech tradition concerns itself especially with protecting and promoting dissent.[374] Obviously, dissent checks the abuse of government power.[375] The principal source of Blasi's enumerated character effects is the environment created by free speech, in which "dissent is both an option and an inescapable reality."[376] People develop these traits by habitually coping with views with which they disagree, in an atmosphere in which it is safe to hold heretical views.

Since Milton, the ideology of free speech has celebrated the ability to encounter evil ideas and come away unscathed. John Durham Peters writes: "Satan represents a key figure in the dramatis personae of free expression, the troublemaker who nonetheless brings about, by the very force of his

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[370] *See* David Braddon-Mitchell & Caroline West, *What Is Free Speech?*, 12 J. POL. PHIL. 437 (2004).

[371] Blasi, *Free Speech and Good Character*, *supra* note 321, at 84. There is a rich literature on the importance of education for democratic citizenship. *See, e.g.*, EAMONN CALLAN, CREATING CITIZENS: POLITICAL EDUCATION AND LIBERAL DEMOCRACY (1997); AMY GUTMANN, DEMOCRATIC EDUCATION (rev. ed. 1999); STEPHEN MACEDO, DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY (2000).

[372] BOLLINGER, *supra* note 323, at 10.

[373] *Id.* at 141. Redish's hostile response to Bollinger shows that he rejects the whole idea of designing the free speech regime in order to promote traits of character. "[T]he use of free speech protection as a means of fostering right thinking," Redish writes, is "an obvious form of mind control." Martin H. Redish, *Freedom of Thought as Freedom of Expression: Hate Crime Sentencing Enhancement and First Amendment Theory*, CRIM. JUST. ETHICS, Summer/Fall 1992, at 29, 34.

[374] *See* STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA (1999); SHIFFRIN, *supra* note 43.

[375] *See* Blasi, *supra* note 51.

[376] Blasi, *Free Speech and Good Character*, *supra* note 321, at 84.

negativity, good in the end."[377] Pornographers, Nazis, and other transgressors of the sacred thus form a stable alliance with civil libertarians. This valorization of "sponsoring study-abroad sojourns in the land of fire and brimstone" is peculiar.[378] Most "cultures do not train souls for the ironic contortionism that liberal subjectivity calls for."[379] Rather, most of the world's population "cannot hear certain things without wanting to hit somebody."[380] Free speech is a distinctive cultural formation, and those who would maintain it had better know what it is that they are maintaining.

It is thus an oversimplification to say that the practice of free expression can be derived from a few simple principles. The traditional goals of free speech—the advancement of truth, the protection of democracy, the facilitation of individual autonomy and self-realization—are elements of a broader pattern of action. The practice has multiple parts, like the organs of a body. And as with a body, it is a mistake to focus on only one function, such as respiration or nutrition, because health is more than that one function. Nor will it do simply to say that there are multiple purposes of free speech.[381] Understanding the importance of respiration, nutrition, and the other functions isn't enough to qualify a doctor. It is necessary to understand how the whole system works and which interventions are likely to have which consequences for the system.

The job of courts is to devise rules that protect the integrity of this field of activity while giving appropriate weight to the whole range of other interests that can conflict with free speech values. Sometimes this produces contestable compromises.[382]

Because free speech is a historical cultural formation, the goods associated with it have developed over time in unpredictable ways. If free speech is a right, it is so for the reasons delineated by Scanlon: "limits on the power of governments to regulate expression are necessary to protect our central interests as audiences and participants, and we believe that such

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[377] PETERS, *supra* note 102, at 84.

[378] *Id.* at 14.

[379] *Id.* at 93.

[380] *Id.*

[381] Joshua Cohen characterizes free speech as derived from a few fundamental interests (expressive, deliberative, and informational) and then notes as the basis for rights government's tendency to underprotect these interests. *See* Joshua Cohen, *Freedom, Equality, Pornography*, *in* JUSTICE AND INJUSTICE IN LAW AND LEGAL THEORY 99 (Austin Sarat & Thomas R. Kearns eds., 1996); Joshua Cohen, *Freedom of Expression*, *in* TOLERATION: AN ELUSIVE VIRTUE 173 (David Heyd ed., 1996).

[382] This is emphatically not an argument for abandoning rules and attempting ad hoc balancing in each case. For reasons amply shown by Emerson and many others, that kind of balancing is likely to yield inadequate protection for speech.

limits are not incompatible with a healthy society and a stable political order."[383]

Compare the game of baseball. There are many good things about baseball, but some are late developments. For example, some baseball fans enjoy radio call-in shows that focus on the sport.[384] And there may even be some for whom this has become one of the main attractions of the game. Yet this development was unforeseeable when the modern game of baseball was invented in the mid-1800s, long before the invention of the telephone and the radio. In some ways, the point is similar to the question whether the right is prior to the good. With respect to free speech, the good is prior to the right: the goods achievable by the practice of free speech are the reason for protecting speech, and the protection should be shaped with those goods in mind. Because these goods have no necessary priority over other goods, however, censorship in the name of nonspeech goods (e.g., obscenity laws) cannot be ruled out a priori on a theoretical level. The promised goods achieved by censorship must be engaged with one at a time.[385]

That the practice of free speech is embedded within local cultural values does not mean that there is no leverage with which to criticize existing rules of law for being insufficiently protective of speech.[386] Obscenity law, for example, is inadequate for achieving its own deepest purposes; the burden it imposes on speech is unjustified even on its own terms.[387] Nonprotection of "fighting words" might be justifiable in theory, but in practice it has almost always been used inappropriately to punish criticism of public policy, often directed at police officers.[388] The power of the Federal Communications Commission to demand "fairness" in broadcasters' coverage of politics was in fact abused to suppress dissenting views.[389] Child pornography law has drifted so far from its original purposes that it now creates a climate of orthodoxy and fear in which

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[383] Scanlon, *supra* note 116, at 536.

[384] Professor Redish is well-known among many Chicagoans who listen to such shows as the frequent radio caller, "Marty from Highland Park." Steven Shiffrin points out in conversation that fantasy baseball has transformed the game for many fans.

[385] One might generate a formalized account of free speech that begins with these goods and virtues and their institutional entailments, and then attempt to deduce rules from these. Such a model, if it could be sustained, would be in some sense constructivist, but it would not be tunnel constructivist unless it ignored consequences. Here I share the skepticism of JONSEN & TOULMIN, *supra* note 74, about an ethical algorithm, but I cannot prove there isn't one. I just have not seen one yet. Thanks to Bruce Ackerman and Samuel Freeman for pressing me on this point.

[386] Ian Shapiro articulates an analogous concern about Michael Walzer's embedded social criticism, which also aims at preserving culturally contingent norms. SHAPIRO, *supra* note 38, at 55–88.

[387] *See* Koppelman, *Does Obscenity Cause Moral Harm?*, *supra* note 149.

[388] *See* Stephen W. Gard, *Fighting Words as Free Speech*, 58 WASH. U. L.Q. 531 (1980).

[389] *See* THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMMING (1994); Thomas W. Hazlett & David W. Sosa, *"Chilling" the Internet? Lessons from FCC Regulation of Radio Broadcasting*, 4 MICH. TELECOMM. & TECH. L. REV. 35 (1998).

parents are warned not to photograph their children in the bathtub.[390] That orthodoxy, the tendency "to speak and perhaps to think and feel by permission,"[391] is the antithesis of the virtues of character that free speech aims to foster.

Free speech, we are often told, is a basic human right.[392] Human rights claims generally assert that a given right is so important, either because having it is necessary to the right holder's autonomy or because the right holder has an urgent interest in its being guaranteed, that it must be respected. The invocation of abstract rights such as free speech captures their importance but can obscure their inevitable cultural and institutional complexity. Their deployment against authoritarian governments, for example, can distract attention from the importance of living in a democratically accountable regime.[393] Once an interest is deemed important enough to be a right, we must ask what is required in order to guarantee it. Universal rights cannot be understood without examining their instantiation in particulars. Any articulation of universal rights must rest on an understanding of the comparative histories of different cultural and institutional forms. It cannot be done by abstract reasoning alone.

Rights are not merely abstentions by government. Many rights entail institutions. A right to a fair trial, for example, presupposes a properly functioning judicial system. A right to marry is unintelligible if rights are merely negative liberties. A right to health care presupposes all the institutions of modern medicine (a culturally specific practice the universal appeal of which is obvious). Property rights depend on reliable state enforcement of standardized forms of ownership and also on a widespread ethos of respect for the property of others.[394]

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[390] *See* Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921 (2001). The anxieties it provokes have also led to the judicially approved, indefinite detention of persons who have never molested children because they had the wrong kind of fantasies. *See* Rachel Aviv, *The Science of Sex Abuse*, NEW YORKER, Jan. 14, 2013, at 36.

[391] George Kateb, *The Freedom of Worthless and Harmful Speech*, *in* LIBERALISM WITHOUT ILLUSIONS: ESSAYS ON LIBERAL THEORY AND THE POLITICAL VISION OF JUDITH N. SHKLAR 220, 235 (Bernard Yack ed., 1996).

[392] A good recent articulation is HEYMAN, *supra* note 206. Heyman claims that the same principles that justify free speech also justify other rights such as privacy and reputation, and that speech is appropriately limited only by the rights of other people. This sensitivity to the effects of speech means that Heyman is no tunnel constructivist. Nonetheless, his analysis obscures important complexities: the hard problems of free speech adjudication do not always involve a collision of rights. Heyman thinks that there is no way to resolve clashes between rights and social interests and that his approach avoids this incommensurability. But he several times finds it necessary to bring government interests back in, and so he recharacterizes them as rights with no gain in clarity. *See id.* at 41–42 ("community rights"), 122 ("the government's responsibility to protect national security"), 130 ("the community's right to govern itself and to implement the laws adopted through the democratic process").

[393] *See* SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY (2010).

[394] *See* Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849 (2007). To be legitimate, property rights also depend on everyone having some. *See generally* WALDRON, *supra* note 227.

Free speech is in some ways even more complex than property because it includes aspirations both to be a certain kind of person and to live in a certain kind of society. These aspirations have cross-cultural attractions, but because in any given formulation they inevitably will be tightly integrated with other ideals, they will necessarily take culturally specific forms (as was the case, we have seen, with Milton and Mill). The demand for a right to free speech is a demand that one's regime include a cluster of this kind. The elements of the cluster need to be brought into equilibrium with one another in a way that does justice to the aspiration as a whole—a project, we shall see, that has implications for the three cases we considered at the beginning of this Article. Delineating the range of real or possible clusters that satisfy this demand would require a research program far beyond the scope of this Article. Here I emphasize the local character of the American right to free speech because that emphasis is a remedy for the crude and premature universalism instantiated by tunnel constructivism.

There are at least two ways to think about the amorphous category of public discourse that has become salient since Milton. You may regard it as a mess that badly needs a theorist to tidy it up.[395] But might it not rather be one of the great achievements of modern civilization?

VI. THE PATHOLOGIES OF TUNNEL CONSTRUCTIVISM REVISITED

Now let us reconsider the pathologies of tunnel constructivism through the lens of the three examples we began with: campaign finance, commercial speech, and copyright. In each of these cases, tunnel constructivism disables us from cognizing what is really at stake and our full range of options.

A. Campaign Finance

Return to the campaign finance problem. Justice Stevens, in his dissent in *Citizens United*, explained why the majority's concept of political corruption was unduly narrow[396]:

> Corruption can take many forms. Bribery may be the paradigm case. But the difference between selling a vote and selling access is a matter of degree, not

[395] Constitutional law's untidiness and lack of deductive clarity has produced consternation among some theorists. *See* Andrew Koppelman, *Respect and Contempt in Constitutional Law, or, Is Jack Balkin Heartbreaking?*, 71 MD. L. REV. 1126 (2012); Andrew Koppelman, *Why Jack Balkin Is Disgusting*, 27 CONST. COMMENT. 177 (2010).

[396] The Court also, as in *New York Times v. Sullivan*, made predictions about the chilling effect of the challenged restriction. Citizens United v. FEC, 130 S. Ct. 876, 890–91, 892, 894–97 (2010). As Justice Stevens noted in dissent, prior individual opinions on which the majority relied had also speculated that the purpose of the law might be the protection of incumbent officeholders. Little evidence supports these allegations. *Id.* at 968–70 (Stevens, J., dissenting). The Court, in short, offered guesses dressed in constructivist garb.

> kind. And selling access is not qualitatively different from giving special preference to those who spent money on one's behalf. Corruption operates along a spectrum, and the majority's apparent belief that *quid pro quo* arrangements can be neatly demarcated from other improper influences does not accord with the theory or reality of politics.[397]

Redish's response to this is the same as the Court's: it doesn't matter. Any restriction on campaign contributions or speech is "a governmentally orchestrated increase in public ignorance" that, because it is "motivated by a paternalistic concern over the citizens' ability to comprehend the expression[,] constitutes an impermissible affront to the dignity of the individual citizen."[398] Statutes that criminalize bribery adequately address the interest in preventing corruption. More generally, any suggestion that the law should be manipulated to change the results of the political process so that it is less responsive to wealthy campaign contributors and more responsive to everyone else, violates the absolute prohibition of viewpoint-based regulation: "Such an approach views free expression as nothing more than a device to be manipulated in order to achieve predetermined normative political agendas."[399]

Any influence obtained by large campaign contributions is of the same kind that any constituent legitimately seeks from elected officials.[400] This truism casts doubt on the corruption claim, but it does not follow that this cannot possibly constitute corruption. If you concentrate enough influence in a small enough share of people, differences of degree will become differences in kind. There are also consequentialist worries about corruption in the other direction: limiting the impact of money in politics will, and may be intended to, magnify the power of other untrustworthy organized interests, such as large media corporations.[401] But determining the balance of distrust is an inquiry in which the Court showed no interest.

For tunnel constructivists, even a campaign financing system that produces oligarchy responsive only to the interests of the wealthy is not inconsistent with a free and democratic society. On the contrary, it *defines* a free and democratic society. Any inequalities "derive, not from direct governmental manipulation of the expressive marketplace, but rather from events and actions wholly untied to the communicative system or its regulation."[402]

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[397] *Id.* at 961.

[398] REDISH, MONEY TALKS, *supra* note 113, at 5.

[399] *Id.* at 144. If this claim is taken literally, then it is not clear why bribery statutes are constitutionally permissible: such statutes restrict a form of expression by someone who wants to influence government decisionmaking, and the restriction is motivated solely by the desire to prevent that influence from becoming effective.

[400] *See id.* at 115–46; *see also* Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663 (1997).

[401] Thanks to John McGinnis for emphasizing this.

[402] REDISH, MONEY TALKS, *supra* note 113, at 12.

Democracy is not only a set of procedures. It is a state of affairs in which people control their own lives and in which government power is not controlled by elites. A properly oriented free speech doctrine should aim at that result. Proponents of the severe restrictions on political speech at issue in *Citizens United* would have to show that those restrictions are necessary for democracy, thus understood. It is not obvious that this can be shown. Certainly Justice Stevens does not show it. But in the Court's constructivist world, that showing, even if it could be made, would not matter. We are in the tunnel. Elite domination can *constitute* democracy. Its oppressive character has disappeared behind the constructivist veil of ignorance.[403]

The Court clings to a constructivist model in the name of democracy, without attention to its consequences for democracy, like a doctor who constructs a model of what the patient must be like and then administers those treatments entailed by the model, without ever examining the patient to determine the consequences of the treatment (because that would be result oriented).

B. Commercial Speech

One of the most prominent triumphs of Redish's constructivist theory is the Supreme Court's growing protection of commercial advertising. In 1970, it was taken for granted that such speech was outside the protection of the First Amendment. Now such speech receives substantial protection. It remains less protected than other speech, however[404]: advertising can be required to contain "such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive,"[405] prior restraints may be permissible,[406] and "misleading" commercial speech is unprotected.[407]

Redish continues to press to make commercial speech as protected as political speech. For example, he argues for strong protection of tobacco advertising. Any restriction on such advertising would "reflect government's paternalistic mistrust of its citizens' ability to make lawful

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[403] A related blind spot appears in Redish's treatment of the activities of the House Un-American Activities Committee (HUAC) in the 1950s. HUAC used its subpoena power to expose many Americans' former Communist affiliations, thereby creating a poisonous atmosphere of intimidation and silence. If the goal of free speech is to establish a vibrant and diverse community of discourse, then HUAC was free speech's deadly enemy. Redish, however, thinks that "HUAC in a sense was facilitating the exercise of nonassociational First Amendment rights of those individuals who, because of their own ideological beliefs, wished to have nothing to do with any current or former member of the American Communist Party." REDISH, LOGIC OF PERSECUTION, *supra* note 152, at 135. Redish acknowledges the risks of chilling speech, but thinks that the appropriateness of the Committee's action under the First Amendment is a close question. *Id.*

[404] *See* REDISH, MONEY TALKS, *supra* note 113, at 14–18.

[405] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 772 n.24 (1976).

[406] *Id.*

[407] *See* Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, 512 U.S. 136, 142 (1994).

choices on the basis of free and open debate."[408] Nor is it permissible when regulating advertising for government to be influenced by its view that smoking is bad for you: suppression "on the basis of government's perception of the speech's wisdom or persuasiveness undermines the basic premises of governmental epistemological humility, without which the First Amendment cannot survive."[409] Tobacco advertising can cause enormous harm, but Redish observes that this is also true of much political speech, which the government should not have the power to censor.

Advertising restrictions are viewpoint discriminatory: the speech is targeted because "it conveys an unpopular (albeit perfectly lawful) social message that challenges the views of those who presently hold political power"[410] in that it urges individuals "to risk the possibility of future health injury in order to obtain certain largely intangible social or personal benefits, as is true of an individual's choice to participate in numerous other risk-producing activities."[411] Cartoon characters such as Joe Camel are presumptively protected because such images "are quite reasonably designed to attract the attention of adult viewers or readers."[412] Regulation of such speech, then, "takes on the ominous character of governmentally orchestrated suppression, manipulation, and mind control—the epitome of the type of expressive regulation the First Amendment precludes."[413]

The veil of ignorance keeps the architects of free speech doctrine from noticing that speech is being used to entice children to experiment with a deadly, addictive drug. Free speech doctrine construes those children's predicament of entering adulthood already hooked on a substance that is

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[408] REDISH, MONEY TALKS, *supra* note 113, at 57.

[409] *Id.*

[410] *Id.* at 60.

[411] *Id.* at 59.

[412] Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589, 629 (1996).

[413] REDISH, MONEY TALKS, *supra* note 113, at 60. On some questions, however, Redish becomes surprisingly accommodating to regulation of tobacco advertising. Five years before *Lorillard Tobacco Co. v. Reilly*, he declared that it is permissible to ban tobacco ads near schools and specifically referred to proposed federal regulations that would ban advertising within 1000 feet of schools and playgrounds, which is what the statute invalidated in *Lorillard* did. Redish, *supra* note 412, at 607–08. (His general point might be distinguished from the facts of *Lorillard*, where the Court noted that "[i]n some geographical areas," the law "would constitute nearly a complete ban" on advertising tobacco. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 562 (2001).) He says that these are "appropriate time-place-manner restrictions," Redish, *supra* note 412, at 607 n.89, but how can they be categorized in this way when they are obviously not content or viewpoint neutral? He also accepts mandated warnings on cigarette packets, *id.* at 625, and even the ban on broadcast advertising of cigarettes, *see id.* at 631–34, in each case saying that these rules may simply be too well-established to change. It is surprising to find him making such concessions. He is, as we have seen, unreconciled with other longstanding rules inconsistent with his theoretical commitments, such as the ban on obscenity. *See supra* notes 142–43 and accompanying text.

spectacularly difficult to quit and likely to kill them as a manifestation of their *freedom*.

The protection of commercial speech has other dangerous entailments. One of the most pressing problems facing the United States is the "war on drugs," which has become a humanitarian and financial catastrophe.[414] One possible alternative is to legalize recreational drugs but to tightly control their distribution and bar their advertisement. That last step, however, violates Redish's Constitution. You might want to legalize cocaine to eliminate the illegal traffic that is destroying our inner cities. But then you must also permit the formidable persuasive resources of modern advertising to be mobilized on that substance's behalf. Imagine what Joe Camel could do with those enormous nostrils.

This result is hard to reconcile with the idea that it is sensible to outlaw cocaine in the first place. If consumers must not be paternalized, then it is impossible to justify the outlawing of the drug. If such paternalism, with its horrendous human consequences, is permissible, then why is this milder solution not permissible? The justification I propose is not the "greater includes the lesser" analysis that Justice Rehnquist offered, which would give government absolute power to bar communication about any lawful product so long as government had the power to criminalize it.[415] That justification would give the government almost boundless power to restrict speech.[416] Rather, the best justification for outlawing cocaine is that there is a very small class of activities—call them vices—that tend to overwhelm people's rational faculties and cause them great harm, and cocaine use is one of these. Perhaps this category, narrowly bounded, should be brought into free speech law so that tighter restrictions may be placed on the advertisement of products that have long been understood to be associated with this kind of destruction. A new First Amendment category of unprotected speech—call it "vice advertising"—would emerge, restricted to a very small category of merchandising. Notice what I'm doing here: trying to invent free speech rules that preserve a broad field for unrestrained discourse, while directly addressing the harm that speech can do. Whether or not you agree with my proposal, my larger methodological point is that this is how free speech doctrine should be created.[417]

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[414] *See* Andrew Koppelman, *Drug Policy and the Liberal Self*, 100 NW. U. L. REV. 279 (2006).

[415] Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 345–46 (1986) ("[T]he greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling . . . ."). There would still be restrictions on the government's ability to bar advertising of contraceptives because it cannot bar their sale. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972).

[416] Redish notes this in *Tobacco Advertising and the First Amendment*, *supra* note 412, at 599–604.

[417] The *Lorillard* case raises another problem: the state was restricting speech to adults in order to prevent the speech from reaching children. In *Butler v. Michigan*, 352 U.S. 380, 383 (1957), the Court held that a state could not "reduce the adult population . . . to reading only what is fit for children." But *Butler* was a case in which the speech was of the highest value—the law covered all printed materials of any kind—and the harm to children of exposure to indecent material was doubtful and speculative.

Tobacco and cocaine are extreme cases, but there is a deeper problem with full protection of commercial speech. Redish reasons that because commercial speech should be entitled to the same protection as political speech, it should receive the protection of *New York Times v. Sullivan*: false and misleading advertising should be actionable only if the speaker knows that it is false or publishes with reckless disregard of whether it is false or not.[418]

Redish's proposal would revolutionize the law of consumer protection. Under the present standard of *Central Hudson*,[419] "misleading" commercial speech is unprotected. Misleading speech is a fuzzy category, and the Court has not explained its meaning: All speech misleads some people. The definition of misleading speech is a normative question: We must decide how many people are too many and how much misinformation is too much.[420]

The federal agencies charged with enforcing statutory prohibitions of misleading commercial speech have, of course, issued regulations that in practice clear up the fuzziness. Whether they do so consistently with the requirements of free speech is another question. Redish's argument, if accepted, would entail dismantling a great deal of consumer protection law.[421]

With respect to tobacco advertising, the value of the speech is lower and the harm is far more severe. Thanks to Martin Redish for demanding clarification of this point.

[418] REDISH, MONEY TALKS, *supra* note 113, at 55–56. He explains this proposal in detail in Martin H. Redish, *Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech*, 43 VAND. L. REV. 1433 (1990) [hereinafter Redish, *Product Health Claims*]. He acknowledges that it is difficult to prove knowledge. Even though he is troubled by "regulating even good faith factual assertions," he suggests that "in the area of product health claims, a complete absence of even arguably probative scientific data to support the claim reasonably could be found to constitute recklessness." *Id.* at 1455. It is not clear, however, how recklessness can fairly be attributed to a marketer who doubts the veracity of science, as many marketers of alternative remedies do. *Cf.* MODEL PENAL CODE § 2.02(2)(c) (1985) ("A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct."). Redish would also allow regulation even absent recklessness if "serious physical harm" could result from a consumer's acceptance of a scientifically inaccurate claim. Redish, *Product Health Claims*, *supra*, at 1456. Finally, the interest in avoiding consumer confusion can be addressed by "requiring inclusion of a disclaimer of government approval." *Id.* at 1457. But why is this not impermissible compelled speech? *See* Post, *supra* note 174, at 26–28; Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in* United Foods, Zauderer, *and* Abood, 40 VAL. U. L. REV. 555 (2006). Redish does not want any differential in treatment of commercial and noncommercial speech, but if books could be censored whenever they made claims that were not supported by even arguably probative scientific data, the result would be a far more oppressive scientific orthodoxy than the state is now constitutionally permitted to impose.

[419] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980).

[420] *See* Shiffrin, *supra* note 328, at 1219. For an analysis of considerations that are relevant if this problem is approached on a case-by-case basis, see Strauss, *supra* note 112, at 369–70.

[421] Schauer notes that "the Securities and Exchange Commission, the National Labor Relations Board, the Federal Trade Commission, the Antitrust Division of the Justice Department, the Office of

Consider food advertisements. FDA regulations provide that health claims for food must be supported by "the totality of publicly available scientific evidence," and there must be "significant scientific agreement, among experts qualified by scientific training and experience to evaluate such claims, that the claim is supported by such evidence."[422] Applying this standard, the FDA allows marketers to assert only a very few specified relationships between foods and the prevention of disease,[423] and marketers may not make any health claims about certain foods if the foods contain nutrients at levels that increase the risk of disease (such as more than thirteen grams of fat per serving).[424] A food manufacturer, even if it sincerely believes that its product prevents a disease that is not on the FDA's approved list, is required to remain silent about its belief when marketing the product. The FDA's evident assumption—an assumption that is entirely realistic—is that "an adequate understanding . . . would require more time and resources than the average consumer could reasonably be asked to invest."[425]

Here is another example. Under the FTC Act, a claim or a material omission of fact made in an advertisement is actionable if it is likely to mislead the reasonable consumer.[426] A representation may be made by implied claims, which the FTC determines by looking at the overall context of the advertisement as well as its literal words. If an advertiser cannot show a reasonable basis for its claim, the FTC will force the advertiser to cease making the claim until it can be substantiated.[427] Neither the FDA nor the FTC standards turn at all on the seller's state of mind. Neither knowledge nor reckless disregard of the falsity matters.

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the Register of Copyrights, the law of evidence, regimes of professional regulation, and quite a few other established mechanisms" are likely to remain undisturbed by free speech law. Schauer, *supra* note 211, at 1806.

[422] 21 C.F.R. § 101.14(c) (2012).

[423] The permissible health-related claims under the regulations are (1) calcium, vitamin D, and osteoporosis, (2) dietary lipids and cancer, (3) sodium and hypertension, (4) dietary saturated fat and cholesterol and heart disease, (5) fiber-containing grain products, fruits, vegetables, and cancer, (6) fiber-containing grain products, fruits, vegetables, and heart disease, (7) fruits and vegetables and cancer, (8) folate and neural tube defects, (9) dietary noncariogenic carbohydrate sweeteners and dental caries, (10) soluble fiber from certain foods and risk of coronary heart disease, (11) soy protein and risk of coronary heart disease, and (12) plant sterol/stanol esters and risk of coronary heart disease. *Id.* §§ 101.72–.83. The regulations go on to elaborately specify precisely how these relationships can be described to the consumer.

[424] *Id.* § 101.14(a)(4).

[425] Post, *supra* note 174, at 41 n.190. These regulations are sensible and valuable, but what I write here should not be construed to bless everything the FDA does. *See* MARION NESTLE, FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH (rev. & expanded ed. 2007).

[426] Douglas W. Hyman, *The Regulation of Health Claims in Food Advertising: Have the FTC and the FDA Finally Reached a Common Ground?*, 51 FOOD & DRUG L.J. 191, 195 (1996).

[427] *Id.* at 195–97.

Why should it? The consumer is equally harmed whether the seller is an unscrupulous swindler or a sincere but deluded quack. Under Redish's proposal, however, absent the risk of serious physical injury, everything would turn on that distinction. Consumer protection would be much harder to provide. People would be misled about the value of what they were purchasing.

If truthful claims are absolutely protected, then a fatty, sugary product with insignificant traces of vitamins would be able to truthfully put "contains vitamins!" on its label. New Lipido Chips could compete with other, genuinely healthy products. Some consumers would be able to figure out the differences between the really healthy products and the misleadingly labeled ones, but a lot of people would be fooled. They would consume less nutritious foods, leading to higher levels of disease and shorter lives. Sickness and death tend to impede self-realization. But, according to Redish, *none of that matters*. The really important thing is preserving free speech principles.[428]

One of the classic single-value constructivist justifications for free speech is the advancement of truth. An unregulated marketplace of ideas will promote the advancement of truth better than any government regulation could. This is an empirical claim, subject to testing, and it turns out to be true in some contexts and false in others. Government regulation of speech is truth advancing in some contexts and not others, but which contexts are which cannot be settled from the scholar's armchair.[429]

Tunnel constructivism makes a different use of the truth rationale: once the consumer is assumed to be perfectly rational and capable of processing information, then the "advancement of truth" becomes available as an ideological rationale for constitutional rules that will in fact promote deception and misinformation.

In both the campaign finance and the advertising cases, the large corporate entities that prey upon ordinary citizens are merely the environment in which liberty is exercised. And any effort to restrict the speech that produces these results would infringe on liberty. Speech regulators may not even know that these consequences exist.

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[428] On the destructive effects of full First Amendment protection for misleading commercial speech, see also Rebecca Tushnet, *It Depends on What the Meaning of "False" Is: Falsity and Misleadingness in Commercial Speech Doctrine*, 41 LOY. L.A. L. REV. 227 (2007). Redish does show that producer advertising and labeling has been a source of valuable information about the benefits of fiber for significant numbers of consumers who were not reached by other sources. Redish, *Product Health Claims*, *supra* note 418, at 1460 n.153. But this took place in an environment in which that speech was screened for accuracy by the state. There may be overreach by regulators, and some valid information may not be reaching the public, but this calls for adjustment, not wholesale destruction, of the regulatory regime.

[429] *See* ALVIN I. GOLDMAN, KNOWLEDGE IN A SOCIAL WORLD 189–217 (1999); Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897 (2010).

Regulation in both cases is, of course, paternalistic. It treats people as if they were not perfectly rational. But people in fact are not perfectly rational. Regulation that pushes people's choices in one direction rather than another can therefore facilitate self-realization by helping to bring about the choices that those people would make if they were perfectly rational.[430]

Consider one more example of paternalistic government regulation of commercial speech. Medicare Advantage (Medicare Part C) is a program in which the government pays private insurers a monthly capitated rate for each Medicare patient who enrolls in the insurers' private plans. Each company then must pay to provide all Medicare services to each beneficiary. As part of their agreement with the federal government, each company must agree that all marketing materials are subject to prior review by the regulator agency, the Centers for Medicare & Medicaid Services, Department of Health and Human Services.[431] The materials must be submitted for agency approval at least forty-five days before they are distributed.[432]

This is, of course, a prior restraint on speech. Worse yet, it is a licensing scheme just like the one Milton opposed, in which the exact language must be approved by a government regulator before it can be published. Of course, this restraint only applies to the beneficiaries of government contracts, and no one is required to contract with the government. But it is settled law that government grants cannot be conditioned on a speaker's agreement to relinquish its right to spend its own money on speech the government does not like.[433] If commercial speech is entitled to exactly the same level of protection as noncommercial speech, this regulation is unconstitutional. But should it matter at all that the recipients of the information are elderly people who are likely to be confused by aggressive marketing of insurance products?

Redish thinks that any diminished protection for commercial speech constitutes a kind of viewpoint discrimination based on disagreement with the capitalist values that advertising conveys. He offers two arguments to support this conclusion. One argument claims that as with obscenity, diminished protection is based on "some form of hostility to or disdain for the capitalist system of which commercial speech is a part."[434] This ad hominem argument reveals again the unreliability of reverse engineering. It

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[430] *See generally* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008).

[431] *See* 42 C.F.R. §§ 422.2260–.2276 (2012). Thanks to Brian Glassman for telling me about these regulations.

[432] *See id.* § 422.2262.

[433] *See* FCC v. League of Women Voters of Cal., 468 U.S. 364 (1984).

[434] Redish, *Commercial Speech*, *supra* note 113, at 121; *see also* REDISH, MONEY TALKS, *supra* note 113, at 21, 41–43.

rests on speculation about the motives of those who support diminished protection. It may be true of some scholars who take this position, but Redish makes the far stronger claim that there are no other grounds for nonprotection.

Robert Post, for example, thinks that the basis of diminished protection for commercial speech is the capitalism-friendly goals of consumer protection and "transparent and efficient markets."[435] To expand on Post's point: Modern capitalism depends on high levels of trust among strangers. Without such trust, it is impossible for a large-scale economy to operate.[436] Government regulation of misleading commercial speech makes it more likely that people will buy unfamiliar products because it encourages them to trust commercial representations. Regulation thus facilitates the operation of the capitalist system. Similarly with offerings of securities. To say that the only motive for diminished protection of commercial speech is hostility to capitalism gets matters exactly backward. Hostility to capitalism should lead to very strong protection for misleading commercial speech.

Redish's other argument is that the nonprotection of commercial speech rests on "moral and/or socio-political considerations that are external to the First Amendment."[437] Any effort to shape public discourse in the name of values that are not derived from free speech principles is "an indirect form of viewpoint discrimination"[438] because the rules are adopted in hopes of fostering a public discourse that contains a set of viewpoints more to the legislator's liking than those that would otherwise exist. Redish is right that his veil of ignorance would filter out such considerations. But that brings back the fundamental question of whether it is a good idea to reside behind Redish's veil of ignorance.

C. Copyright

In the campaign finance and tobacco advertising cases, determinate results were reached by reasoning within the veil of ignorance. My objection was not that tunnel constructivist reasoning is impossible, but rather that it produces illiberal and destructive results. With copyright, however, one cannot even begin thinking about what the law should be from behind a veil of ignorance. There is no way to resolve these questions at the level of high theory—or more precisely, trying to do so misses the point. The purpose of copyright law is to foster a vibrant sphere of discourse in which it is possible for authors who are not independently wealthy to quit their day jobs. That, however, is a result, not a process.

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[435] Post, *supra* note 176, at 177.

[436] *See generally* FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY (1995).

[437] Redish, *Commercial Speech*, *supra* note 113, at 110; *see also id.* at 113.

[438] REDISH, MONEY TALKS, *supra* note 113, at 111.

Engineering it should be an undertaking in the spirit of Milton, Mill, and Emerson. It depends on understanding how the world works and calibrating the law to what we learn about the world.

The proper entailment of constructivist free speech theory might be to do away with copyright law altogether. Copyright law casually violates many of the core principles of free speech jurisprudence. Content-based restrictions on speech are presumptively unconstitutional and subject to strict scrutiny. Yet to tell whether a work infringes on a copyright, one must read it, read the copyrighted work, and compare.[439] Prior restraints are supposedly never permissible, but in copyright cases, courts issue injunctions all the time.[440] Viewpoint discrimination is supposed to be unconstitutional per se, but borrowing from a copyrighted work is more likely to be permissible if it is a parody that is "critical" of that work.[441] Regulations of speech are not constitutional when they prohibit particular ways of expressing ideas, rather than the ideas themselves. The Court rejects the notion that ideas are distinguishable from the way that they are expressed, yet copyright law turns on precisely that distinction.[442] Copyright law is not a restriction on the time, place, or manner of speech because it does not permit ample alternative channels for the same speech.[443] Rights vary depending on the identity of the speaker: works created "for hire," typically by employees of entertainment corporations, get different durations than works created by individuals.[444] Even with respect to unprotected categories of speech, such as obscenity, libel, incitement, and fighting words, the Court has developed rules ensuring that restrictions do not infringe on core speech interests.[445] Yet there is "astonishingly little contemporary judicial discussion of copyright's First Amendment implications."[446]

The limits of tunnel constructivism are clearest in libertarian debates over copyright law. Libertarians fall into two opposing camps on the intellectual property issue. One, friendly to very strong intellectual property rights, holds that the creation of ideas is a kind of labor. Since individuals have a natural right to the fruits of their labor, a person who creates a work

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[439] *See* Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 5 (2002).

[440] *See id.* at 6; Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998).

[441] *See* Rubenfeld, *supra* note 439, at 6–7, 17.

[442] *See id.* at 13–16.

[443] *See* Volokh, *supra* note 25, at 703–11.

[444] *See* 17 U.S.C. § 302 (2006). There are other major differences in treatment of works for hire too complex to go into here. *See* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 5.03 (2009). Thanks to Peter DiCola for calling my attention to this area of copyright doctrine.

[445] Rubenfeld, *supra* note 439, at 7.

[446] *Id.*

should have an absolute right (in perpetuity?) to control its use.[447] The other camp, suspicious of monopoly privileges created by government, notes that this is a very peculiar kind of property right: a copyright over work means that the copyright holder can tell another person what he can or (more pertinently) cannot print with his own press, using his own ink and his own paper. There is no scarcity that requires government intervention: one person copying a book does not prevent anyone else from copying the same book. It follows that there should be no intellectual property rights at all.[448] Both libertarian positions are tunnel constructivisms that start with different sets of assumptions and work out their logical implications. Each depends on fetishizing its own favored property rights, which have nothing to do with the actual liberty of human beings in the world. They simply differ about which ones to fetishize.[449] The inability of both to justify their starting points guarantees that their debate will remain sterile.

The pathologies of libertarianism matter here because they have infected copyright law. Copyright has come to look more like a full property right than a limited government grant for a particular purpose. The consequence has been an increasingly tight bottleneck for speech by small, independent speakers and a loss of creative diversity in the arts.

Jed Rubenfeld responds to these pathologies with his own deductive theory of free speech protection. The core of free speech, he claims, is the "freedom of imagination." That freedom broadly means "the freedom to explore the entire universe of feeling-mediated-by-ideas. It means the freedom to explore, without state penalty, any thought, any image, any emotion, any melody, as far as the imagining mind may take it."[450] In practice, this would mean that copyright protection only applies to the exact text or image produced by the author. Persons other than the author would have the right to make modifications and derivative works, subject only to a claim for disgorgement of the proportionate share of profits attributable to using the underlying work. Injunctions would never be available for anything other than literal pirating and copying.

There are two difficulties with Rubenfeld's principle. The first is its foundation, which is vulnerable for the reasons we have already seen with Redish. Rubenfeld disavows "[g]iant-sized First Amendment theories" that try to derive free speech from democracy or autonomy.[451] "The First Amendment is not a 'universal right of man'; it is a piece of the ineluctably

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[447] *See, e.g.*, Adam Mossoff, *Is Copyright Property?*, 42 SAN DIEGO L. REV. 29 (2005).

[448] *See, e.g.*, N. STEPHAN KINSELLA, AGAINST INTELLECTUAL PROPERTY (2008).

[449] For an attempt to devise a middle ground, which itself characteristically purports to be a deduction from first principles, see AYN RAND, *Patents and Copyrights*, *in* CAPITALISM: THE UNKNOWN IDEAL 130 (1967).

[450] Rubenfeld, *supra* note 439, at 38.

[451] *Id.* at 30.

political, historical United States Constitution."[452] From the paradigm case of works of art, Rubenfeld derives his principle of freedom of imagination.

However, to whatever extent the freedom of imagination entails a revolution in present practice, it cannot be presented as merely an inference from American practice. The speech-infringing copyright rules that Rubenfeld denounces are as much a part of American practice as the protection of art. The latter cannot provide the ground from which to attack the former because Rubenfeld's decision to base his rules on local practice, without more, leaves him no basis for privileging either over the other.[453]

Rubenfeld's second difficulty is that his proposed rules could produce unfortunate incentive effects—just the kind of effects with which copyright law is legitimately concerned. Netanel observes that some secondary works that are similar to the original, such as edited books or films, can act as market substitutes for the original. Some works, such as screenplays, are created only as the basis for derivative work. Some derivative works, such as film adaptations of books, take years to produce and require significant capital investment. In all of these cases, the incentive to create the original may disappear unless the creator is given the power to bar derivative works, at least for a few years.[454]

Netanel's objections are sympathetic ones. They preserve the operation of Rubenfeld's principle with a few narrowly drawn exceptions. The exceptions, however, raise all Rubenfeld's free speech objections anew. They are content based. They authorize prior restraints. (So does Rubenfeld, with respect to outright copying.) Netanel's approach is consistent with the greater protection of parodies, a distinction that is viewpoint based.

More generally, rules of copyright law necessarily restrict some speech for the sake of a broader and more vibrant world of speech. This kind of enterprise is quite foreign from free speech theory as the Court conceives it: "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ."[455] That, however, is what copyright law does. The public gets one mix of publicly available books, music, and movies if there is no copyright protection and a different

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[452] *Id.*

[453] My account of free speech is also based on local practice, but I am explicitly privileging an ideal, to the derogation of contrary aspects of existing practice. Perhaps Rubenfeld could do the same, but then he would have to be more explicitly normative than he is, and I suspect that for the reasons I lay out immediately below, he would want to embrace a less absolute principle.

[454] NETANEL, *supra* note 24, at 198.

[455] Buckley v. Valeo, 424 U.S. 1, 48–49 (1976). In the same opinion, however, the Court endorsed a teleological vision: "[T]he First Amendment . . . was designed to secure the widest possible dissemination of information from diverse and antagonistic sources . . . ." *Id.* at 49 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266 (1964)) (internal quotation marks omitted).

mix if there is strong copyright protection; one mix if derivative works are enjoinable and a different mix if they are not.

Thus, it is no surprise that the critics of the modern copyright regime, which has become far more producer protective since Congress enacted major amendments in 1976,[456] have not been content to make the tautological point that copyright stifles some speech. Instead, they have offered specific evidence of the speech that has been stifled and compared it with the speech that is thus facilitated in order to persuade the reader that the tradeoff is not worth it.[457] Netanel correctly concludes that the appropriate level of copyright protections cannot be determined "without making value judgments about the types and mix of expression and speakers we want our copyright system to foster."[458]

More generally, questions of how to preserve the thriving sphere of public discourse and facilitate the participation of a broad range of diverse and antagonistic views reach beyond free speech law or even intellectual property. They affect matters, such as the design of the Internet, the architecture of computer code, and the regulation of telecommunications technology, that do not involve any coercive sanctions upon speech.[459] Here, too, we must make value judgments about the kind of universe of discourse we wish to inhabit.

Such value judgments would constitute the twilight zone of viewpoint discrimination that Redish thinks is forbidden: we would adopt rules for the regulation of speech because we hope to encourage certain speech and discourage other speech. "[T]he ideological neutrality of the system of free expression is essential to that system's very existence; without it, the system will inevitably implode."[460] Redish does not, however, tell us how

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[456] NETANEL, *supra* note 24, at 54–80.

[457] *See* LAWRENCE LESSIG, FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY (2004); LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY (2008); KEMBREW MCLEOD & PETER DICOLA, CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING (2011); Olufunmilayo B. Arewa, *Copyright on Catfish Row: Musical Borrowing,* Porgy and Bess, *and Unfair Use*, 37 RUTGERS L.J. 277 (2006); Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547 (2006); Olufunmilayo B. Arewa, *The Freedom to Copy: Copyright, Creation, and Context*, 41 U.C. DAVIS L. REV. 477 (2007); Anupam Chander & Madhavi Sunder, *Everyone's a Superhero: A Cultural Theory of "Mary Sue" Fan Fiction as Fair Use*, 95 CALIF. L. REV. 597 (2007); Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CALIF. L. REV. 1331 (2004); Madhavi Sunder, *IP*^{3}, 59 STAN. L. REV. 257 (2006); Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651 (1997).

[458] NETANEL, *supra* note 24, at 128.

[459] *See* LAWRENCE LESSIG, CODE: VERSION 2.0 (2006); Jack M. Balkin, Commentary, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004); Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427 (2009).

[460] REDISH, MONEY TALKS, *supra* note 113, at 42.

such choices can be avoided in copyright law. As long as there is copyright law, the system will reflect such choices.

CONCLUSION

Redish, the leading theorist of free speech tunnel constructivism, argues that "the principle of epistemological humility . . . underlies the entire concept of free speech protection."[461] His veil of ignorance follows from that principle: "[P]reference for a particular ideology should never play any part in justifying governmental restriction of expression."[462]

However, as Larry Alexander observes, the principle of epistemological humility, which Redish thinks is characteristic of any free speech theory, generates internal contradiction:

> Freedom of expression is paradoxical within *any* plausible normative theory. That is because the requirement of evaluative neutrality is the core of any right of freedom of expression, but evaluative neutrality cannot coexist with *any* normative theory. Any normative theory, liberal or not, will perforce take positions on what ought to be done given our best judgment of what the world is like. To the extent that expression . . . threatens to produce states of affairs inconsistent with those the normative theory prescribes, to that extent the normative theory must, as a matter of logical consistency, rule the expression to be pernicious and of negative value.[463]

The consequence of the paradox is that no theory of free speech can maintain absolute epistemological humility. Even a theory that made freedom of expression so absolute as to override all other human interests "would face a paradox in dealing with expression that threatened to undermine *it*."[464]

This point is devastating only if free speech must take the form Redish describes, committed to absolute evaluative neutrality. However, as we have seen, the style of reasoning committed to absolute evaluative neutrality is a fairly recent development in free speech theory. Milton, Mill, Hand, Holmes, Brandeis, Meiklejohn, and Emerson were not committed to absolute evaluative neutrality. Of course, they did aspire to a field of neutrality—any conception of free speech will do that—but within limits. They were unapologetically devoted to certain substantive values. It was from those substantive values that they derived their commitment to free speech, which allowed for limitations.[465]

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[461] *Id.* at 48.

[462] *Id.* at 43.

[463] ALEXANDER, *supra* note 174, at 177.

[464] *Id.* As noted earlier, Redish responds to this difficulty only by assuming that there is no speech that could undermine his system.

[465] Only once does Alexander concede that liberalism may be understood as "a way of life, a vision of the Good, a partisan view among partisan views." *Id.* at 169. He declares it unattractive because "cosmopolitanism inevitably tends to homogenize and shallow out the various ways of life." *Id.* This is

Samuel Freeman has suggested that the recurring popularity of libertarianism in the United States is the consequence of living in a free market system in which people are led to believe in the sanctity of property and the justice of market distributions.[466] Once they come to believe that they have a fundamental right to whatever the market delivers, they will resist taxation to pay for public infrastructure or for health care and income support for the poor, elderly, or handicapped. This is a problem for liberalism as an ideal: "[C]lassical liberal institutions may be prone to disintegrate into libertarianism."[467] Free speech may present an analogous problem: In a society that values speech, speech-protective rules can be fetishized in the same way that libertarians fetishize property rules, with similarly illiberal results.

Free speech theory should return to its roots. It should stand for a very specific understanding of freedom and individual dignity, which it seeks to realize in the actual lives of human beings in the world.

Any theory of liberty commits itself to neutrality about some questions. But no individual commitment to neutrality entails commitment to every kind of neutrality.[468] The neutrality entailed by free speech does not logically mean that we must consent to rule by moneyed elites, or that tobacco advertisers must be free to prey on children, or that we cannot recalibrate the rules of copyright to produce less Disney and more small, independent writers and artists.

Constructivism is a valuable rhetorical tool. It provides one useful lens through which to think about government. But our ultimate goal should not be elegantly constructed, deductive rules of free speech. It should be a free society made up of free people.

Nietzsche's old complaint that a liberal society does not produce heroic or admirable characters, but merely meek bourgeoisie who do not take anything very seriously. I will here simply record my view that liberalism has its own heroes and deeply felt ideals (some of which have been described here), and that Alexander does not specify which alternative to liberalism he finds preferable. Some admirers of Nietzsche have been less circumspect.

[466] Freeman, *supra* note 78, at 150.

[467] *Id.*

[468] *See* Koppelman, *The Fluidity of Neutrality*, *supra* note 80.